TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1462.

DAVID S. TERRY AND SARAH A. TERRY, HIS WIFE, APPELLANTS,

vs.

FREDERICK W. SHARON, EXECUTOR OF WILLIAM SHARON, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED DECEMBER 26, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 26, 1888.

that she falsely and fraudulently pretends that she was duly married to your orator on or about the 25 day of August, anno Domini 1880, at the city and county of San Francisco, State of California; that she pretends that while said marriage was not solemnized by any justice of the supreme court, judge of the superior court, justice of the peace, priest, or minister of the gospel of any denomination, yet that your orator and the said defendant, Sarah Althea Hill, did, on the day and year last aforesaid and at the place aforesaid, jointly make in writing a declaration of marriage, substan-
3 tially showing the names, ages, and residences, respectively, of your orator and the said Sarah Althea Hill, and did in the same writing jointly do and perform all and singular the acts required by section 75 of the Civil Code of the State of California, contained in part III, title I, chapter I, article II, of said code, to constitute a marriage between them, and thereby became and have ever since been and now are husband and wife according to the law of the State of California.

IV.

And your orator further shows that all and singular the said public and private claims, representations, and pretenses of the said Sarah Althea Hill were and are wholly and maliciously false and untrue, and the same have at all times been and now are falsely and maliciously made by her for the purpose of injuring your orator in his property, his business, and his social relations; for the purpose of obtaining credit by the use of the name of your orator with merchants and others, and thereby compelling your orator to maintain her, and for the purpose of harassing your orator into the payment of large sums of money to quiet her said false pretensions, and for purpose of harassing and injuring your orator's estate and his true heirs-at-law and next of kin in the event of his death, and of compelling his heirs at law and legatees to pay her large sums of money to quiet her said false and fraudulent claims and pretensions; and your orator further shows that the defendant, the said Sarah Althea Hill, is not and never was the wife of your orator by a solemnization of marriage, contract, declaration in writing, or otherwise; that she was not duly or at all married to your orator on the 25th day of August, 1880, or at any other time, at the city and county of San Francisco, State of California, or elsewhere, by solemnization of marriage, contract, or declaration of marriage, or at all; that your orator and the said defendant, the said Sarah Althea Hill, did not on the day and year alleged or any other time, at the place alleged or elsewhere jointly or otherwise make in writ-
4 ing or otherwise the said alleged declaration of marriage, substantially or at all showing the facts by her alleged, and especially the facts required to be shown by their joint declaration, as required by the said section 75 of the said Civil Code of the State of California, or any other facts tending or pretending to be in compliance with said section; all of which the said defendant, Sarah Althea Hill, then well knew and now well knows.

V.

And your orator further shows that the said Sarah Althea Hill claims to have now in her possession a declaration of marriage in writing, jointly made and executed by your orator and herself, bearing date August 25th, 1880, and that the same is in substantial compliance with the provisions of section 75 of the Civil Code of the State of California; and your orator shows that if the said Sarah Althea Hill has in her possession such an instrument, the same is false, forged, and counterfeited, so far as your orator is concerned; that he never, either on the day of the date of said alleged joint declaration of marriage or at any other time, made or executed such document or declaration, and never knew or heard of the same until within one month last past; that your orator has never been shown or had an inspection of said alleged joint declaration of marriage, but he is informed that the same is substantially in the words and figures following:

"In the city and county of San Francisco, State of California, on the 25th day of August, 1880, I, Sarah Althea Hill, of the said city and county of San Francisco, Cal., aged twenty-seven years, do here, in the presence of Almighty God, take Senator William Sharon, of the State of Nevada, to be my lawful and wedded husband, and do hereby acknowledge and declare myself to be the wife of Senator William Sharon, of the State of Nevada.

"(Signed) SARAH ALTHEA HILL.

"San Francisco, Cal., August 25, 1880."

"I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself sees fit to make it known.

"(Signed) S. A. HILL."

"In the city and county of San Francisco, State of California, on the 25th day of August, 1880, I, Senator William Sharon, of the State of Nevada, age 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city of San Francisco, to be my lawful and wedded wife, and do hereby acknowledge myself to be the husband of Sarah Althea Hill.

"(Signed) WILLIAM SHARON,
"*Of Nevada.*

"August 25, 1880."

Your orator further shows that said instrument in all its parts, so far as the same purports to be a declaration of marriage by your orator with said Sarah Althea Hill, is false, forged, counterfeit, and fraudulent; that he never made or signed the same or any part thereof, and the same is null and void as against him and ought in equity and good conscience to be so declared, and ordered to be delivered up, to be annulled and cancelled.

VI.

All of which actions, pretensions, and claims are contrary to equity and good conscience, and tend to the manifest injury and wrong of your orator in the premises.

VII.

In consideration whereof, and forasmuch as your orator is without remedy in the premises at common law and cannot have adequate relief except in a court of equity, where matters of this sort are properly cognizable and relievable, to the end that the said Sarah Althea Hill may, according to the best and utmost of her knowledge, full and perfect and distinct answer make to all and singular
6 the matters aforesaid, and that as fully and particular- as if the same were repeated and she thereunto distinctly interrogated, your orator hereby waiving an answer upon oath; and that it be adjudged and decreed that the said Sarah Althea Hill is not and never was the wife of your orator; that your orator and the said Sarah Althea Hill did not, as is by her alleged and represented or otherwise or at all, make the said joint declaration of marriage or any marriage between them, and that the said defendant, Sarah Althea Hill, be perpetually enjoined and restrained from making said allegations, representations, and pretensions of marriage with your orator, and that said false, fraudulent, forged, and counterfeited contract or joint declaration of marriage between your orator and said Sarah Althea Hill may be decreed and adjudged so to be, and to be delivered up to be cancelled and annulled according to the practice of courts of equity in like cases, and that your orator may have such further and other relief in the premises as to your honors may seem meet and the nature and justice of the case may require—

And may it please your honors to grant unto your orator the writ of subpœna to be directed to the said Sarah Althea Hill, thereby commanding her, at a certain day to be therein limited, personally to be and appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to the court may seem meet, and that your orator may have the writ of injunction against the said defendant in the premises, and according to the prayer of your orator.

And your orator will ever pray, etc.

W. H. L. BARNES,
Solicitor for Complainant.

W. T. WALLACE, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
District of California, }

7 William Sharon, being duly sworn, deposes and says that he is the above-named complainant; that he has read the foregoing bill of complaint and knows the contents thereof; that

the said bill of complaint is true, of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters that he believes it to be true.

WM. SHARON.

Subscribed and sworn to before me this 3d day of October, A. D. 1883.

[SEAL.] C. H. JACKSON,
Notary Public.

Endorsed: Filed October 3d, 1883. L. S. B. Sawyer, clerk.

Subpœna.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

The President of the United States of America to Sarah Althea Hill, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room in San Francisco, on the fifth day of November, A. D. 1883, to answer a bill of complaint exhibited against you in said court by William Sharon, who is a citizen of the State of Nevada, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit, under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of October, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the 108th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the
8 above suit, on or before the first Monday of November next, at the clerk's office of said court pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

L. S. B. SAWYER, *Clerk.*

(Endorsed.)

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 3d day of Oct., 1883, and personally served the same on the 5th day of Oct., 1883, by delivering to and leaving with Sarah Althea Hill, said de-

fendant named therein, personally, at the city and county of San Francisco, in said district, an attested copy thereof.

M. M. DREW,
U. S. Marshal.

Filed October 8, 1883.

L. S. B. SAWYER, *Clerk.*

Demurrer.

In the Circuit Court of the United States, 9th Circuit, District of California.

WILLIAM SHARON, Plaintiff,
vs.
SARAH ALTHEA HILL, Defendant.

The defendant, Sarah Althea Sharon, sued herein under the name of Sarah Althea Hill, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth, demurs thereto, and for cause of demurrer showeth that the said bill does not contain any matter of equity whereon the court can ground any decree or give to the complainant any relief against this defendant.

Wherefore the defendant humbly demands the judgment of this honorable court whether she shall be compelled to make any
9 further or other answer to the said bill, and prays to be hence dismissed with her reasonable costs in this behalf most wrongfully sustained.

TYLER & TYLER,
Solicitors for Defendant.

We, the undersigned, counsellors of this court, certify that in our opinion the foregoing demurrer is well founded in law.

TYLER & TYLER,
Solicitors for Defendant.

(Endorsed:) Service of copy of within admitted this 1st day of December, A. D. 1883. W. H. L. Barnes, solicitor for pl'ff. Filed December 3d, 1883. L. S. B. Sawyer, clerk.

At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Monday, the third day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge; the Honorable George M. Sabin, U. S. district judge, Nevada.

Order Overruling Demurrer.

WILLIAM SHARON
vs.
SARAH A. HILL. } No. 3138.

This cause, heretofore argued and submitted to the court for consideration and decision upon the demurrer to the bill of complaint herein, having been duly considered, it is ordered that said demurrer be, and the same hereby is, overruled, with leave to the defendant to answer herein on or before the next rule day on payment of twenty dollars.

10 I hereby certify that the foregoing is a full, true, and correct copy of an order made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 15th day of January, 1886.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk*.

Plea in Abatement.

In the Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM SHARON, Plaintiff, *vs.* SARAH A. HILL, Defendant.

Now comes defendant, Sarah A. Sharon, sued herein under the name of Sarah A. Hill, by Tyler & Tyler, her solicitors, and pleads judgment of the said writ and declaration, because she says that heretofore, to wit, on the first day of November, 1883, this defendant brought an action against the plaintiff herein in the superior court of the city and county of San Francisco, State of California, department No. 3, said action being numbered 11051 on the files of said court, and entitled Sarah Althea Sharon, plaintiff, *vs.* Wm. Sharon, defendant; that the complaint in said above-mentioned action alleged in substance that the plaintiff and defendant were husband and wife, and that they had become such by virtue of a certain declaration of marriage, dated August 25th, 1880, which said declaration of marriage was signed and executed by said plaintiff and defendant in substantial compliance with section 75 of the Civil Code of the State of California.

That thereafter and until the month of November, 1881, or thereabouts, the said plaintiff and defendant had lived and cohabited together as husband and wife.

11 That said complaint prayed for a divorce from said defendant, Wm. Sharon, on the ground of defendant's adultery and desertion.

That on the 10th day of November, 1883, said defendant, Wm. Sharon, by his attorney, W. H. L. Barnes, Esq., filed an answer in said cause denying that said plaintiff and defendant were husband

and wife, and in which he alleged that the said declaration of marriage had never been signed or executed by said defendant, and in said answer said defendant prayed for affirmative relief on said last-mentioned ground, said complaint and answer being duly verified.

That thereafter, to wit, on or about the 20th day of November, 1883, the said defendant, Wm. Sharon, filed his certain petition and bond in said superior court of the city and county of San Francisco, State of California, alleging in said petition that he, the said defendant, was a citizen of the State of Nevada; and thereafter, to wit, on the 24th day of November, 1883, a certified copy of the record in said action was duly entered in the circuit court, ninth circuit, district of California, thereby duly removing said action to said circuit court, on the ground as stated in said petition.

That said action was thereupon placed upon the equity calendar of this honorable circuit court and duly set down for trial for the January term thereof.

That thereafter, on or about the 31st day of December, 1883, a stipulation was filed in this honorable court and signed by the respective parties hereto, agreeing that the said suit of Sharon *vs.* Sharon be remanded to the superior court of the city and county of San Francisco, State of California, from whence it came, and thereupon this honorable court made an order duly remanding and transferring the said action of Sharon *vs.* Sharon to said superior court, pursuant to said stipulation as aforesaid.

That upon the 10th day of March, 1884, the trial of said action of Sharon *vs.* Sharon was begun in the said superior court of said city and county, and said trial is now in progress.

12 That the principal allegation in the declaration herein is that the said declaration or contract of marriage is false, fraudulent, and simulated, and that the said William Sharon never signed the same or any part thereof.

That the only issue in said case of Sharon *vs.* Sharon, now on trial as aforesaid, is as to whether the plaintiff and defendant are or are not husband and wife, and in proof of said issue the plaintiff relies mainly upon the said declaration, claiming the same to be a genuine contract and declaration of marriage between herself and the said William Sharon.

That said declaration of marriage has been admitted in evidence by said superior court of said city and county, marked Plaintiff's Exhibit No. 1, and is now under the direction and control of said court.

This defendant further alleges and shows that this court has no jurisdiction of the matters set forth in said writ and declaration herein, because the plaintiff, William Sharon, is and has for more than three years last past been a resident and citizen of the State of California and, together with his family, has continuously resided in said State.

Wherefore the defendant prays that the said writ and declaration

be quashed, and that she be hence dismissed with her costs in this behalf expended.

TYLER & TYLER,
Solicitors for Defendant.

We, the undersigned, counsellors of this court, certify that in our judgment the foregoing plea is well founded in law.

TYLER & TYLER,
Solicitors for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Sarah A. Sharon, being first duly sworn, deposes and says that she is the defendant in the action above entitled; that she has heard read the foregoing plea and knows the contents thereof; that
13 said plea is not interposed for delay, and is, as defendant is informed and believes, true in point of fact.

SARAH A. SHARON.

Subscribed and sworn to before me this 23d day of April, 1884.

WM. G. BURKE,
Deputy County Clerk.

(Endorsed:) Service of the within plea is admitted this 24th day of April, 1884. W. H. L. Barnes, solicitor for plaintiff. Filed April 24th, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

Replication to Plea.

In the Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

WILLIAM SHARON, Plaintiff,
vs.
SARAH ALTHEA HILL, Defendant.

And the said plaintiff, as to said plea in abatement of the defendant by her pleaded, saith that the plaintiff, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having the relief demanded by him against the said defendant or from having judgment as prayed for in his bill of complaint, because he saith that the matters set forth in said plea do not constitute a judgment of plaintiff's writ or declaration, and because it is not true that this court has no jurisdiction of the matters set forth in said writ and declaration, and because it is not true that the plaintiff,
William Sharon, is or for more than three years last past has
14 been a resident or citizen of the State of California or, together with his family, has continuously resided in said State.

Wherefore plaintiff prays that he may have the relief prayed for in his said bill of complaint.

W. H. L. BARNES,
Solicitor for Plaintiff.

(Endorsed:) Service of within replication hereby admitted by copy this 3d day of May, A. D. 1884. Tyler & Tyler, solicitors for defendant. Filed May 5th, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

At a stated term, to wit, the July term, A. D. 1884, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 16th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order Adjudging Plea False and Overruling Same.

WILLIAM SHARON
vs.
SARAH ALTHEA HILL. } No. 3138.

This cause, heretofore argued and submitted to the court for consideration and decision upon the plea to the jurisdiction of this court, having been duly considered, it is now here ordered that said plea be, and the same hereby is, adjudged false and is overuled, with costs, no testimony having been taken to support it, with leave to the defendant herein to answer to the merits within thirty days.

I hereby certify that the foregoing is a full, true, and correct copy of an order made and entered in the above-entitled cause.

15 Attest my hand and the seal of said circuit court this 15 day of January, 1886.

L. S. B. SAWYER, *Clerk*,
[SEAL.] By F. D. MONCTON,
Deputy Clerk.

Answer.

In the Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM SHARON, Plaintiff, *vs.* SARAH A. HILL, Defendant.

Now comes the defendant, Sarah A. Sharon, falsely sued herein under the name of Sarah A. Hill, by Tyler & Tyler, her solicitors, and, answering the bill of complaint of the plaintiff herein—

Denies and says that it is not true that the plaintiff has been for many years and is now an unmarried man.

Denies and says it is not true that the plaintiff is a citizen of the State of Nevada, but alleges that the plaintiff is and for more than three years last past has been a citizen and resident of the State of California.

The defendant denies and says it is not true that the plaintiff has never been the husband of any other person but Maria Ann Sharon.

Denies and says it is not true that at the time of filing plaintiff's bill of complaint herein the defendant was an unmarried woman.

The defendant denies and says it is not true that she has ever falsely or fraudulently pretended that she was married to plaintiff on the 25th day of August, 1880, or at any other time, but she admits that for more than fifteen months last past this defendant has at all times and places, in public and private, in the news-
16 papers, in the grand jury room, in the civil and criminal courts of the city and county of San Francisco and elsewhere, asserted and insisted that she was and ever since the 25th day of August, 1880, had been the legal and lawful wife of said plaintiff.

Defendant denies and says it is not true that the claims of this defendant are wholly or at all false, and denies and says it is not true that said claims were made for any other purpose but that of obtaining the recognition and support justly due to this defendant as the wife of said plaintiff.

Denies and says it is not true that the defendant was never the wife of plaintiff, but alleges and avers that plaintiff and defendant herein intermarried at the city and county of San Francisco on the 25th day of August, 1880, as hereinafter set forth.

Defendant denies and says it is not true that the declaration of marriage set forth in the bill of complaint herein is null and void, and denies and says it is not true that the same is false, forged, or counterfeit, but alleges and avers that the said declaration of marriage is a valid and genuine instrument.

Second.

For a further and separate answer and defense to this suit the defendant alleges that plaintiff ought not to be permitted to prosecute this suit, because she says—

That on the 25th day of August, 1880, the plaintiff and defendant herein became by mutual agreement husband and wife, and each assumed towards the other that relation, and from that date the plaintiff and defendant lived and cohabited together as husband and wife.

That on said 25th day of August, 1880, and inasmuch as said marriage had not been solemnized in the mode provided by section 70 of the Civil Code of California, the plaintiff and defendant jointly made and executed a declaration of marriage in writing, signed by each of them, substantially in the words and figures as set forth in plaintiff's bill of complaint herein.

That thereafter and until the month of November, 1881,
17 the plaintiff and defendant lived and cohabited together as husband and wife; that on or about the 25th day of November, 1881, the plaintiff demanded a surrender to him of said declaration of marriage, refused to recognize his said marriage with the defendant, and willfully deserted this defendant.

That on or about the first day of November, 1883, this defendant brought an action for divorce against the plaintiff herein in the superior court of the city and county of San Francisco, State of California, said action being numbered 11051 on the files of said court,

and entitled Sarah Althea Sharon, plaintiff, *vs.* William Sharon, defendant.

That the allegations of marriage in the complaint in said action above mentioned were principally founded upon the said declaration of marriage.

That upon the 10th day of November, 1883, the said defendant, William Sharon, by his attorney, W. H. L. Barnes, Esq., filed an answer in said cause denying that said plaintiff and defendant were husband and wife, and in which said answer he in substance alleged that said declaration of marriage was fraudulent and void and had never been signed by said defendant, William Sharon, and in said answer said defendant prayed for affirmative relief on said last-mentioned ground, said complaint and answer being duly verified.

That thereafter, to wit, on or about the 20th day of November, 1883, the said defendant in said action filed his certain petition and bond in said superior court of the city and county of San Francisco, State of California, alleging in said petition that he, the said defendant, was a citizen of the State of Nevada, and thereafter, to wit, on the 24th day of November, 1883, a certified copy of the record in said action was entered in the United States circuit court, ninth circuit, district of California, thereby duly removing said action to said court, said cause being numbered of record No. 3161 in said circuit court.

That said action was thereupon placed upon the equity
18 calendar of this honorable court and duly set down for trial for the January term thereof, A. D. 1884.

That thereafter on the 31st day of December, 1883, a stipulation was signed by the respective parties to said action and filed in this honorable court, the said stipulation being in the words and figures following, to wit:

"In the Circuit Court of the United States in and for the Ninth Circuit, District of California.

SARAH ALTHEA SHARON, Plaintiff,

vs.

WILLIAM SHARON, Defendant.

It is hereby stipulated by and between the respective parties that the above-entitled suit may be remanded to the superior court of the city and county of San Francisco, State of California, from whence it came.

San Francisco, Dec. 10th, 1883.

W. H. L. BARNES,
Solicitor for Def't.
TYLER & TYLER,
Sol'rs for Plaintiff.

(Endorsed:) Filed Dec. 31st, 1883. L. S. B. Sawyer, clerk."

That thereupon this honorable court made an order duly remanding and transferring said action of Sharon *v.* Sharon to said superior court.

That in regard to the trial of said cause in said superior court a stipulation was entered into by the respective parties and filed in said superior court, said stipulation being in the words and figures following, to wit:

"STATE OF CALIFORNIA,
City and County of San Francisco:

In the Superior Court.

SARAH ALTHEA SHARON, Plaintiff,
vs.
WILLIAM SHARON, Defendant.

It is hereby stipulated and agreed by and between the respective parties to this suit that the above-entitled cause may be assigned to dep. 2 of said court, and tried by Hon. J. F. Sullivan, without a jury.

TYLER & TYLER,
Att'y for Pl'tf.
W. H. L. BARNES,
Att'y for Def't."

That upon the 10th day of March, 1884, the trial of said action of Sharon *v.* Sharon was begun in said superior court of said city and county; that said cause was submitted to said court for its decision on or about the 17th day of September, 1884, occupying over eighty days of actual trial.

That thereafter, to wit, on the 24th day of December, 1884, said court rendered its decision in said action, finding and deciding that the parties in said action, to wit, Sarah Althea Sharon and Wm. Sharon, were and since the 25th day of August, 1880, had been husband and wife.

That the said declaration of marriage set forth in plaintiff's bill of complaint herein was true and genuine, and that the written signature, Wm. Sharon, was the genuine signature of the defendant in said action.

That said parties had lived and cohabited together as husband and wife.

That defendant therein had deserted the plaintiff, and that the plaintiff, Sarah Althea Sharon, was entitled to a divorce from the defendant, Wm. Sharon, and to a division of the common property of plaintiff and defendant; and the defendant herein avers
20 and shows to this court that the genuineness of the said declaration of marriage sought by plaintiff to be litigated and determined in this honorable court in this suit has been fully and fairly tried in the superior court of the city and county of San Francisco, State of California, a court of record, having full and complete

jurisdiction over the parties and over the subject-matter of this suit, and the defendant avers that the question sought to be tried herein by virtue of the trial and determination of the same in the State court of California has become *res adjudicata* as between plaintiff and defendant and plaintiff has no longer any right to be heard herein.

Wherefore defendant prays that said plaintiff take nothing by this suit; and, having fully answered, she may be hence dismissed with her costs in this behalf expended.

TYLER & TYLER,
Solicitors for Defendant.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Sarah A. Sharon, being duly sworn, deposes and says that she is the defendant in the above-entitled action; that she has heard read the foregoing answer and knows the contents thereof; that the same is true of her own knowledge except as to those matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

MRS. S. A. SHARON.

Subscribed and sworn to before me this 30th day of December, 1884.

F. D. MONCTON,
Commissioner U. S. Circuit Court, Ninth Circuit, District of California.

(Endorsed:) Received copy Dec. 30, 1884. W. H. L. Barnes, solicitor for plaintiff. Filed December 30th, 1884. L. S. B. Sawyer, clerk.

21 *Replication to Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

WILLIAM SHARON, Plaintiff,
vs.
SARAH ALTHEA HILL, Defendant.

The replication of Wm. Sharon, plaintiff, to the answer of Sarah Althea Hill, defendant.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage or exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver, maintain, and prove the said bill to be true, certain, and sufficient in the law to be answered unto, and that said answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be re-

plied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true.

All of which matters and things this repliant avers and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by *its* said bill *it* has already prayed.

W. H. L. BARNES,
Solicitor for Plaintiff.

W. T. WALLACE,
Of Counsel.

(Endorsed:) Service of within replication hereby admitted by copy this 2d day of January, A. D. 1885. Tyler & Tyler, solicitors for def't. Filed January 2d, 1885. L. S. B. Sawyer, clerk.

22 *Supplemental Answer.*

In the Circuit Court of the United States in and for the Ninth Circuit, District of California.

WILLIAM SHARON, Complainant,
vs.
SARAH A. SHARON, Sued as SARAH ALTHEA HILL, Respondent.

By leave of the court the respondent files this her supplemental answer, and alleges that since the filing of her answer herein the superior court of the city and county of San Francisco, State of California, in the case of Sarah Althea Sharon *vs.* Wm. Sharon, has filed its findings and decree, wherein it is adjudged that the agreement sought to be cancelled in this suit is a genuine contract of marriage between the parties in that suit, and that said parties became by reason of said contract and other matters — are husband and wife.

Wherefore she prays as in her original answer.

TYLER & TYLER,
Solicitors for Respondent.

(Endorsed:) Rec'd copy February 24th, 1885. W. H. L. Barnes, solicitor for complainant. Filed February 25th, 1885. L. S. B. Sawyer, clerk.

Replication to Supplemental Answer.

In the Circuit Court of the United States, Ninth Circuit, District of California. In Equity.

WILLIAM SHARON, Complainant,
vs.
SARAH ALTHEA HILL, Defendant.

The replication of Wm. Sharon, plaintiff, to the supplemental answer of Sarah Althea Hill, defendant.

23 This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advan-

tage of exception which may be had or taken to the manifold insufficiencies of the said supplemental answer, for replication thereunto saith that he will aver, maintain, and prove said bill to be true, certain, and sufficient in the law to be answered unto, and that said supplemental answer of the defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said supplemental answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant avers and will be ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in and by its said bill it has already prayed.

W. H. L. BARNES,
Solicitor for Plaintiff.

W. T. WALLACE, *Of Counsel.*

(Endorsed:) Service of within replication hereby admitted by copy this 11th day of March, A. D. 1885. Tyler & Tyler. Filed March 11th, 1885. L. S. B. Sawyer, clerk.

Enrollment.

In the Circuit Court of the United States, Ninth Circuit, District of California.

WILLIAM SHARON, Complainant,
vs.
SARAH ALTHEA HILL, Respondent. } No. 3138.

The complainant filed his bill of complaint herein on the 3d day of October, 1883, which is hereto annexed.

24 A subpœna to appear and answer in said cause was thereupon issued, returnable on the 5th day of November, A. D. 1883, which is hereto annexed.

The respondent appeared herein on the 3rd day of November, 1883, by Tyler & Tyler, Esqs., her solicitors.

On the 3d day of December, 1883, a demurrer to said bill of complaint was filed herein, which demurrer is hereto annexed.

On the 3rd day of March, 1884, an order overruling said demurrer was made and entered herein, a certified copy of which order is hereto annexed.

On the 24th day of April, 1884, a plea in abatement was filed herein, which is hereto annexed.

On the 5th day of May, 1884, a replication to said plea was filed herein, which replication is hereto annexed.

On the 16th day of October, 1884, an order adjudging said plea false, &c., was made and entered herein, a certified copy of which order is hereto annexed.

On the 30th day of December, 1884, an answer was filed herein, which is hereto annexed.

A replication to said answer was filed herein on the 2d day of January, 1885, which replication is hereto annexed.

On the 25th day of February, 1885, a supplemental answer was filed herein, which supplemental answer is hereto annexed.

A replication to said supplemental answer was filed herein on the 11th day of March, 1885, which replication is hereto annexed.

On the 15th day of January, 1886, a final decree was filed and entered herein in the words and figures following, to wit:

At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city and county of San Francisco, on Saturday, the 26th day of December, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Lorenzo Sawyer, circuit judge, presiding.

Decree.

WM. SHARON, Complainant,
vs.
SARAH ALTHEA HILL, Respondent. } No. 3138.

This cause came on to be further and finally heard before Hon. Lorenzo Sawyer, circuit judge, presiding, and Hon. Matthew P. Deady, district judge, on the 29th day of September, A. D. 1885, being a day in the July term, A. D. 1885, of said court, and, having been argued by counsel, was finally submitted to the court for its decision, and thereupon, after due consideration, it was decided and determined by the court that the written instrument purporting to be a declaration of marriage, bearing date August 25, 1880, set out and described in the bill of complaint, and a copy of which is hereinafter set out, was not nor was any part thereof on that day or at any time signed or executed by complainant, William Sharon; that said instrument is false, counterfeited, fabricated, forged, and fraudulent, and is therefore utterly null and void; and it was thereupon ordered that a decree be entered accordingly and for such further relief as is prayed for in the bill.

And it now appearing that said complainant departed this life on the 13th day of November, A. D. 1885, after the argument and final submission of this case to the court for its decision and decree, it was further ordered that the decree herein be entered *nunc pro tunc* as of the 29th day of September, A. D. 1885, a day prior to the decease of said complainant. It is therefore now ordered, adjudged, and decreed *nunc pro tunc* as of said 29th day of September, A. D. 1885, that the said instrument in writing purporting to be a declaration of marriage, set out and described in the bill of complaint herein, was not nor was any part thereof signed or executed on said 25th day of August, A. D. 1880, or at any time by said complainant, William Sharon; that it is not genuine and is not the declaration, contract, agreement, or any other instru-

ment of complainant, William Sharon; that it is false, counterfeited, fabricated, forged, and fraudulent, and as such is utterly null and void.

And it is further adjudged and decreed that the same be, and it is hereby, cancelled and utterly annulled.

The said false, counterfeited, fabricated, forged, and fraudulent instrument so cancelled and annulled is in the words and figures following, to wit:

"In the city and county of San Francisco, State of California, on the 25th day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, State of California, aged 27 years, do here, in the presence of Almighty God, take Senator William Sharon, of the State of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the State of Nevada.

"August 25th, 1880, San Francisco, Cal.

"SARAH ALTHEA HILL."

"I agree not to make known the contents of this paper or its existence for two years, unless Mr. Sharon himself see fit to make it known.

"S. A. HILL."

"In the city and county of San Francisco, State of California, on the 25th day of August, A. D. 1880, I, Senator William Sharon, of the State of Nevada, age 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city of San Francisco, Cal., to be my lawful and wedded wife, & do here acknowledge myself to be the husband of Sarah Althea Hill.

"Nevada, Aug. 25, 1880.

"WM. SHARON."

And it is further ordered, adjudged, and decreed that the said instrument purporting to be a declaration of marriage, within twenty days after notice of this decree to respondent or to Messrs. Tyler & Tyler, her solicitors, be delivered by the respondent to and
27 deposited with the clerk of this court, to be endorsed "cancelled;" and, upon such delivery, that said clerk write across the same "cancelled," by virtue of this decree, and sign his name and affix thereto the seal of this court, and that the said document thereafter remain in the custody of said clerk, subject to the further order of the court.

And it is further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent and her and their agents and attorneys, be, and they and each and all of them are hereby, perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same in evidence or otherwise to

support any right claimed under it, or making any claim or setting up any right, interest, or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit.

Dated as of September 29th, 1885.

LORENZO SAWYER,
Circuit and Presiding Judge.
MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed and entered January 15th, 1886, as of September 29th, 1885. L. S. B. Sawyer, clerk.

28 *Memorandum of Costs and Disbursements.*

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, of the Ninth Circuit, in and for the District of California.

WILLIAM SHARON, Complainant,
vs.
SARAH ALTHEA HILL, Respondent.

Disbursements:

Marshal's fees	$107 15
Clerk's fees	332 30
Witness' fees	97 60
R. U. Piper, February 25, 26, 27, March 2, 3, 4, 5, 6, 9, 16, 18, 19, 20, 23, 24, 26, 28, 31, April 21, 22, 24, 27, 28, May 6, 7, 11, August 3, 5—30 days	$48 00
Ah Sam, April 11	1 60
Nellie Bracket, April 13	1 60
H. C. Hyde, April 14, 15, May 1	4 80
R. C. Hopkins, April 16	1 60
J. P. Martin, April 16	1 60
Jas. H. Dobinson, April 24, 29, July 29	4 80
H. W. Barnett, April 29	1 60
S. F. Thorn, April 29	1 60
F. G. Smith, May 1	1 60
Geo. A. Lowe, May 1	1 60
Mrs. Mary H. Brackett, July 23	1 60
Mrs. Sarah Millett, July 23	1 60
Mrs. Sarah Morgan, July 24	1 60
Mrs. Harriett Kenyon, July 24	1 60
Edward Hawthorne, July 28	1 60
Mrs. Nellie Bacon, July 28	1 60
A. S. Iredale, July 28	1 60

M. L. Wolf, July 28		$1 60
	Melissa Turner, July 28	1 60
29	R. H. Fitzgerald, July 29	1 60
	Victor Craig, July 29, August 3, 5	4 80
John J. Mone, July 30		1 60
Martha Wilson, July 30, 31		3 20
James L. Mosher, July 31		1 60
		$97 60

Docket fee	$20 00
Solicitor's fees, 41 depositions @ $2.50	102 50
Fees of master in chancery	2,297 50

1.20 P. M.

No one appearing to oppose, same taxed at $2,957.05.

L. S. B. SAWYER, *Clerk.*

UNITED STATES OF AMERICA,
District of California, City and County of San Francisco, } ss:

F. V. Bell, being duly sworn, deposes and says that he is one of the solicitors for the complainant in the above-entitled cause, and as such is better informed relative to the above costs and disbursements than the said complainant; that the items in the above memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

F. V. BELL.

Subscribed and sworn to before me this 31st day of December, 1885.

S. C. HOUGHTON,
Commissioner U. S. Circuit Court, &c.

To Messrs. Tyler & Tyler, solicitors for respondent:

You will please take notice that on Monday, the fourth day of January, A. D. 1886, at the hour of 1 o'clock p. m., I will apply to the clerk of said court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said court in such case made and provided.

Dec. 31st, 1885.

W. H. L. BARNES,
Solicitor for Complainant.

30 (Endorsed:) Service of a copy of the within memorandum of costs and disbursements hereby admitted this 31st day of December, 1885. Tyler & Tyler, solicitors for respondent. Filed December 31st, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

Clerk's Certificate.

Whereupon said pleadings, subpœna, certified copies of orders, final decree, and a memorandum of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.:

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

(Endorsed:) Enrolled papers. Filed January 15th, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

31 *Bill of Revivor.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

FREDERICK W. SHARON, Executor of the Will of William Sharon, Deceased, Plaintiff,
vs.
DAVID S. TERRY and SARAH ALTHEA TERRY, his Wife, Defendants.

To the honorable the judges of the circuit court of the United States, ninth circuit, northern district of California:

Humbly complaining, showeth unto your honors, your orator, Frederick W. Sharon, executor of the will of William Sharon, deceased—

That the said William Sharon in his lifetime, being then a citizen of the State of Nevada, did, on the 3d day of October, 1883, exhibit his original bill of complaint in this honorable court, then acting in and for the district of California, against Sarah Althea Hill, of San Francisco, a citizen of the State of California, but now known as Sarah Althea Terry, wife of David S. Terry, of
32 Stockton, in said State, stating that the said plaintiff and defendant were then unmarried persons, and that said defendant did falsely and fraudulently claim to be the wife of plaintiff, and did falsely and fraudulently claim that a certain written contract or declaration of marriage had been jointly executed by said plaintiff and defendant, in words and figures in said bill of complaint fully and particularly set forth, reference to which is hereby made for a full statement of the contents thereof, and alleging that said written contract or declaration of marriage was forged, counterfeit, and fraudulent, and that this said plaintiff, Wm. Sharon, never signed the same or any part thereof, and praying that said false, fraudulent, forged, and counterfeited contract or joint declaration of marriage be decreed to be delivered up and cancelled and annulled, and that the said defendant be perpetually enjoined and restrained from making said allegations and pretensions of marriage with said plaintiff, and for other and further relief, and making other state

ments, allegations, and prayers, as by reference to said bill of complaint will more fully appear; and the said Sarah Althea Hill, now known as Sarah Althea Terry, being duly served with process of subpœna for that purpose, appeared and did demur, plead, answer, and make supplemental answer thereto, and said demurrer and plea having been overruled by said court, and plaintiff having duly replied to said answer and supplemental answer, witnesses were examined and sworn in said cause on both sides, and after a full hearing and argument of said cause the same was finally submitted for decision on the 29th day of September, 1885, and thereafter, after due consideration, it was decided, adjudicated, determined, and decreed by the court that the said written instrument purporting to be a declaration of marriage, set out and described in the said bill of complaint, and a copy of which was set out in full in said decree, was not executed by the plaintiff,
Wm. Sharon, and that the same is false, counterfeited,
33 fabricated, forged, and fraudulent; and that the same be cancelled and utterly annulled and be delivered to and deposited with the clerk of said court, and be endorsed "cancelled" under the seal of said court, and remain in the custody of said clerk subject to the further order of said court; and that said Sarah Althea Hill and her representatives and all other persons claiming by or through her and her and their agents and attorneys be perpetually enjoined from alleging the genuineness or the validity of said instrument, or making any use of the same in evidence or otherwise to support any rights claimed under it or making any claim or setting up any right, interest, or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, as by the said pleadings, proceedings, and decree now remaining as of record in this honorable court, reference being then had, will now fully appear.

Your orator further shows that after the final submission of said cause and before the entry of decree therein the said plaintiff, William Sharon, departed this life in the city and county of San Francisco, on the 13th day of November, A. D. 1885, and on the 15th day of January, A. D. 1886, said court ordered that the decree in said cause be entered *nunc pro tunc* as of the 29th day of September, A. D. 1885, being the date of the final submission of said cause and anterior to the death of said plaintiff.

Your orator further shows that before departing this life said plaintiff made and published his last will and testament in writing, bearing date the 31st day of May, 1884, and thereby appointed your orator the executor thereof; that the said will was duly proved in
the superior court of the city and county of San Francisco,
34 State of California, on the 3d day of February, 1886, and that on the 4th day of February, 1888, letters testamentary were issued to your orator by said superior court as the executor of the will of said William Sharon, deceased, a duly certified copy of which

letters is filed with this bill, and that your orator has thereby become and now is his legal personal representative.

And your orator further shows that the said suit and further proceedings under said decree and in question and enforcement thereof have become abated by the death of the said William Sharon, plaintiff in said action; that said instrument of writing has not been surrendered for cancellation as ordered by said decree, and your orator fears that the said defendant will claim and seek to enforce property rights as the wife of said plaintiff, by virtue of said written declaration of marriage, under a decree of another court, essentially founded thereupon, which decree, as your orator is advised, is wholly subject and subordinate to the decree of this court, contrary to the true intent, meaning, and spirit of the perpetual injunction ordered by the said decree and in violation of the said injunction; and your orator is, as he is advised, entitled to have the said suit and proceedings under the said decree in execution and enforcement thereof revived against the said Sarah Althea Hill, now known as Sarah Althea Terry, and to have the said cause and proceedings therein in the execution of said decree put in the same plight and condition as the same was in previously to the abatement thereof by the death of said Wm. Sharon.

And your orator further shows that since the entry of said decree the said defendant, Sarah Althea Hill, now known as Sarah Althea Terry, has intermarried with David S. Terry, of the city of Stockton, State of California, which marriage was duly solemnized on the 7th day of January, 1886.

To the end, therefore, that the said cause and the proceed-
35 ings under said decree may stand revived and be in the same condition and plight in which the same were at the time of the death of said plaintiff, Wm. Sharon, and before and at the time of the intermarriage of the said defendant, Sarah Althea Hill, now Sarah Althea Terry, with the said David S. Terry, or that the said Sarah Althea Terry and David S. Terry may show good cause to the contrary—

May it please your honors to grant unto your orator a writ of subpœna to revive, issuing out of and under the seal of this honorable court, to be directed to the said David S. Terry and Sarah Althea Terry, his wife, thereby commanding them, at a certain day and under a certain penalty to be therein inserted, personally to be and appear before your honors in this honorable court, then and there to show cause, if they can, why the said suit and the proceedings therein had should not stand and be revived against them and be in the same plight and condition as the same were at the time of the abatement thereof, and further to stand to and abide such order and decree in the premises as to your honors shall seem meet.

And your orator will ever pray, etc.

WM. F. HERRIN,
Solicitor for Plaintiff.

(Endorsed:) Filed March 12, 1888. L. S. B. Sawyer, clerk.

36 *Subpœna.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California. In Equity.

The President of the United States of America to David S. Terry and Sarah Althea Terry, his wife, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the court-room, in San Francisco, on the second day of April, A. D. 1888, being the next rule day of said court, to answer a bill of revivor to revive the suit or cause hereinafter mentioned exhibited against you in said court by Frederick W. Sharon, as executor of the will of Wm. Sharon, deceased, and you are hereby required to show cause, if any you can, before said court on said day why that certain suit or cause wherein said William Sharon, deceased, who was a citizen of the State of Nevada, was complainant, and the above-named Sarah Althea Terry, formerly Sarah Althea Hill, who was a citizen of the State of California, was defendant, should not be revived in the name of said Frederick W. Sharon, executor as aforesaid, as complainant, against you and each of you as defendants, and to do and receive what the said court shall have considered in that behalf; and this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of March,
37 in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the 112th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed.)

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 13th day of March, 1888, and personally served the same on the 14th day of March, 1888, by delivering to and leaving with David S. Terry and Sarah Althea Terry, his wife, sued as Sarah Althea Hill in original bill herein, said defendants named therein, personally, at the county of Fresno, in said district, an attested copy thereof, and also personally served, on the 14t hday of March, 1888, by delivering to and leaving with Sarah Althea Terry, his wife, said defendant named therein, personally, at the county of Fresno, in said district, a certified copy of the bill of revivor, certified to by the clerk of the U. S. circuit court, L. S. B. Sawyer.

San Francisco, March 15th, 1888.

J. C. FRANKS,
U. S. Marshal.

(Endorsed:) Returned and filed March 15th, 1888. L. S. B. Sawyer, clerk.

38 In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

FREDERICK W. SHARON, Executor, &c., Plaintiff,
vs.
DAVID S. TERRY and SARAH A. TERRY, Defendants.

The joint and several demurrer of David S. Terry and Sarah A. Terry, the above-named defendants, to the bill of complaint of Frederick W. Sharon, executor of the estate of William Sharon, deceased.

These defendants, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, do demur to said bill, and for cause of demurrer show that the plaintiff hath not in and for his said bill made or stated such a case as entitled him in a court of equity to any dis-
39 covery from these defendants or either of them or to any relief against them or either of them as to the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendants do demur thereto, and humbly demand the judgment of this court whether they or either of them shall be compelled to make any further or other answer to said bill, and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

STANLY, STONEY & HAYES,
Counsel for Defendants.

We hereby certify that we are solicitors and of counsel for the defendants in the above-entitled cause, and that, in our opinion, the foregoing demurrer of David S. Terry and Sarah A. Terry, defendants, to the bill of complaint of Frederick W. Sharon, executor, &c., complainant, is well founded in point of law and proper to be filed in the above cause.

STANLY, STONEY & HAYES,
Solicitors and of Counsel for Defendants.

40 UNITED STATES OF AMERICA, } ss:
District of Northern California, }

David S. Terry and Sarah A. Terry, being each duly sworn, deposes and says that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

D. S. TERRY.
S. A. TERRY.

Subscribed and sworn to before me this 29th day of March, 1888.
[SEAL.]
E. H. THARP,
Notary Public.

(Endorsed:) Due and timely service of a copy of the within is hereby admitted this 2nd day of April, 1888. Wm. F. Herrin, solicitor for plaintiff. Filed April 2, 1888. L. S. B. Sawyer, clerk.

41 *Amended Demurrer.*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

FREDERICK W. SHARON, Executor, Etc., Plaintiff,

vs.

DAVID S. TERRY and SARAH A. TERRY, Defendants.

The defendants, by leave of court first had and obtained, file this their amended demurrer to plaintiff's bill:

These defendants, by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer showeth:

1st. That this court has no jurisdiction of the subject-matter of this suit.

2nd. That this court has no jurisdiction to grant the relief prayed for in said bill or any part thereof.

3rd. That the plaintiff has not shown any right or title to maintain this suit.

4th. That the said bill is ambiguous and uncertain in this—it fails to show what particular property is involved therein.

42 5th. That the said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against these defendants or either of them.

Wherefore and for other good causes of demurrer appearing in the said bill the defendants do demur thereto, and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the said bill; and they pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

STANLY, STONEY & HAYES,
Counsel for Defendants.

We hereby certify that we are solicitors and of counsel for the defendants in the above-entitled cause, and that in our opinion the foregoing demurrer of David S. Terry and Sarah A. Terry, defendants, to the bill of complaint of Frederick W. Sharon, executor, &c., complainant, is well founded in point of law and proper to be filed in the above cause.

STANLY, STONEY & HAYES,
Solicitors and of Counsel for Defendants.

UNITED STATES OF AMERICA,
Northern District of California, } ss:

David S. Terry and Sarah A. Terry, being each duly sworn, depose and say that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

D. S. TERRY.
S. A. TERRY.

Subscribed and sworn to before me this 4th day of May, 1888.
[NOTARIAL SEAL.] E. H. THARP,
Notary Public, City and County of San Francisco.

43 (Endorsed:) Receipt of a copy of the within is hereby admitted this 5th (fifth) day of May, 1888. Wm. F. Herrin, solicitor for complainant.
(Endorsed:) Filed May 5, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

44 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

FREDERICK W. SHARON, Ex'r, &c., Complainant,
vs.
DAVID S. TERRY *et al.*, Respondents. } No. 3138.

The complainant filed his bill of revivor herein on the 12th day of March, 1888, which is hereto annexed.
A subpœna to appear and answer in said cause was thereupon issued, returnable on the second day of April, A. D. 1888, which is hereto annexed.
The respondents appeared herein on the 2nd day of April, 1888, by Stanley, Stoney & Hayes, Esqs., their solicitors.
On the 2nd day of April, 1888, a demurrer was filed herein, which is hereto annexed.
On the 5th day of May, 1888, an amended demurrer was filed herein and is hereto annexed.
Thereafter a decree was filed and entered herein in the words and figures following, to wit:

45 At a stated term, to wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room, in the city and county of San Francisco, State of California, on Monday, the third day of September, in the year of our Lord one thousand eight hundred and eighty-eight.
Present: The Honorable Stephen J. Field, circuit justice, presiding; the Honorable Lorenzo Sawyer, circuit judge, and the Honorable George M. Sabin, district judge.

Order of Revivor.

FREDERICK W. SHARON, as Executor of the Last Will of William Sharon, Deceased, Complainant,
vs.
DAVID S. TERRY and SARAH ALTHEA TERRY, His Wife, Defendants.
} In Equity. No. 3138.

This cause came on to be heard at this term upon the bill of revivor filed by Frederick W. Sharon, as executor of the last will of William Sharon, deceased, the original complainant in this cause, against David S. Terry and Sarah Althea Terry, his wife, as defendants, and the demurrer (amended) of said defendants to said bill; and the said cause was argued by counsel, and thereupon, after due consideration thereof, it was ordered, adjudged, and decreed as follows, viz: That the said demurrer be, and the same is hereby,
46 overruled, and that the original suit of William Sharon, complainant, against Sarah Althea Hill (now the said Sarah Althea Terry above named), as respondent, and the proceedings and final decree therein stand revived in the name of Frederick W. Sharon, as executor of the last will of said William Sharon, deceased, as complainant, and against said Sarah Althea Terry and David S. Terry, her husband, as respondents, said executor being substituted as complainant in the place of William Sharon, deceased, and said David S. Terry being joined as defendant with his wife as respondent, and that the said suit and the proceedings and decree therein be in the same plight and condition they were in at the death of the said William Sharon, and that the said executor, complainant as aforesaid, do have the full benefit, rights, and protection of said final decree, and full power to enforce the same against the said defendants and each of them at all times and in all places and in all particulars.

FIELD, *Circuit Justice.*
SAWYER, *Circuit Judge.*
SABIN, *Dist. Judge.*

(Endorsed:) Filed and entered September 17, 1888. L. S. B. Sawyer, clerk.

Whereupon said pleadings, subpœna, and decree are hereto annexed, said decree being duly signed, filed, and enrolled pursuant to the practice of said circuit court.

Attest, etc.
(SEAL.)
L. S. B. SAWYER, *Clerk,*
By F. D. MONCKTON, *Deputy Clerk.*

Endorsed: Enrolled papers. Filed September 17th, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

47 *Notice of Motion for Leave to File Affidavits of Value of Matter in Dispute.*

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

WILLIAM SHARON, Complainant,
vs.
SARAH ALTHEA HILL, Defendant.

To the defendant in the above-entitled cause and Messrs. David S. Terry and Stanly, Stony & Hayes, her solicitors and counsel:

You and each of you are hereby notified that Frederick W. Sharon, the executor of the last will of William Sharon, deceased, the original complainant in said cause, will move the above-named court, at the court-room thereof, in the city and county of San Francisco, State of California, on Wednesday, the 11th day of July, A. D. 1888, at the opening of court on that day, or as soon thereafter as counsel can be heard, for leave to file the annexed affidavits of James M. Allen and J. P. Martin in support of the jurisdiction in and over said cause of the said court and its predecessor, the circuit court of the United States in and for the ninth circuit and district of California.

The papers upon which the said executor will rely upon said motion are this notice, the said annexed affidavits, the enrolled papers, and the record and evidence in said cause.

WM. F. HERRIN,
Solicitor for said Executor.

R. S. MESICK, *Of Counsel.*

48 *Affidavit of Value, &c.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

In the Circuit Court of the United States, Ninth Circuit, Northern District of California. In Equity.

WILLIAM SHARON, Complainant,
vs.
SARAH ALTHEA SHARON, Defendant. } No. 3138.

J. P. Martin, being first duly sworn, deposes and says—

That for more than ten years preceding November 13th, A. D. 1885, this deponent was well and intimately acquainted with William Sharon, the complainant in the above-entitled suit, and with his social, business, and financial standing and condition in both the States of California and Nevada; that during said period said complainant was accustomed to associate with and to entertain a large circle of friends and acquaintances of high social, business,

and political standing and of large wealth, and that during that period he represented the State of Nevada as its Senator in the Senate of the United States for a term of six years, ending on the fourth day of March, A. D. 1881.

And this deponent further says that on the twenty-fifth day of August, A. D. 1880, and at all times thereafter and during the pendency of this suit, until the fourth day of November, A. D. 1885, said complainant was the owner of and possessed of a large estate, consisting of real and personal property, amounting in value to not less than five millions of dollars over and above all his debts and liabilities and was reputed so to be generally amongst the people of said States and was receiving a large income from said estate from month to month.

And this deponent further says that he knows what was a reasonable support for the wife of a man in the station and circumstances of said complainant in the place where complainant lived
49 and the cost and expense thereof on the twenty-fifth day of August, A. D. 1880, and ever since, and also what was the probable duration of the life of a person of the same condition and age as the defendant from the twenty-fifth day of August, A. D. 1880, and also from the date of the commencement of this suit, and that the probable duration of the life of said defendant from said twenty-fifth day of August, A. D. 1880, and also from the date of the commencement of this suit was ten years and upwards, and that the expense per annum of supporting in a reasonable manner the wife of a man in the social and financial condition of complainant during that period in the community where he lived was six thousand dollars and upwards, and that the amount of money necessary to be expended by complainant in the future from the twenty-fifth day of August, A. D. 1880, for the reasonable support of the defendant as his wife, had she been his wife, was six thousand dollars and upwards per annum, and that the value of the support of the defendant for the future during her probable natural life was fifty thousand dollars and upwards.

And this deponent further says, according to his best information and belief, that the complainant received subsequently to the said twenty-fifth day of August, A. D. 1880, the sum of two thousand dollars and upwards on account of his salary as Senator in the United States Senate for the period of time between said date and the expiration of his term of office as such Senator, which occurred on the fourth day of March, A. D. 1881.

And this deponent further says, according to his best information and belief, that between the said twenty-fifth day of August, A. D. 1880, and the date of the commencement of this suit, to wit, the 3rd day of October, A. D. 1883, the said complainant was seized in fee in his own right of the following lands, tenements, and real property situated in Washington city, District of Columbia, described as follows:

50 Lots 3, 4, 5, 9, 10, 11, 14, 15, and 19, & part of lot 6, in square 67; lots 2, 3, 15, & 16, in square 68; lots 16 & 17, in square 69; part of lots 9 & 10, in square 97; lots 46 to 149, in-

clusive, in square 151; lots (subdivided) 22 to 59, inclusive, in square 153; the following lots in square 156, namely: Lots (subdivided) 35 to 58, inclusive, and lots (subdivided) 68 to 125, inclusive; also lots (subdivided) 138 to 163, inclusive; part of lots 9 & 10 and lot 17, in square 158; lots E & F, in square 177; and that the value of said lands, tenements, and real property was on said 3rd day of October, A. D. 1883, and ever since has been the sum of three hundred thousand dollars and upwards.

J. P. MARTIN.

Subscribed and sworn to before me this 5th day of July, 1888.
[SEAL.] JAMES MASON,
Notary Public.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

(Title of court and cause.)

James M. Allen, being first duly sworn, deposes and says—

That he is and has been for eight years last past an attorney and counsellor of the above-named court and its predecessor, the circuit court of the United States in and for the ninth circuit and district of California; that he is now and during said time has been an attorney and counsellor at law in the supreme court of the State of California; that he is familiar with the proceedings in the above-entitled suit, and also with the proceedings in the action of Sarah Althea Sharon, plaintiff, *vs.* William Sharon, defendant, in the superior court of the State of California in and for the city and county of San Francisco, which said action and proceedings are
51 referred to in the answer of Sarah Althea Hill, the defendant in this cause, filed herein; and affiant attaches to this affidavit a true copy of the judgment-roll in said action; which copy is marked "Exhibit A" and is hereby referred to and made a part hereof, as if the same were incorporated in this affidavit.

And affiant further says that the plaintiff in said action, Sarah Althea Sharon, is the same person who is defendant in this cause and who is now known as Sarah Althea Terry, as particularly stated in the bill of revivor filed herein by and on behalf of Frederick W. Sharon, executor of the last will of William Sharon, the original complainant in this cause.

And affiant further says that on or about the 8th day of January, 1885, the plaintiff in said action in said superior court filed and gave notice of her motion for an order requiring the defendant, William Sharon, to pay alimony and counsel fees to the plaintiff and her attorneys and counsel; that said notice (omitting the title of court and cause) is in the following words and figures, to wit:

"To William Sharon, defendant above named, and W. H. L. Barnes, Esq., his attorney:

"You and each of you will please take notice that we will move this honorable court, at the court-room thereof (department No. 2),

in the new city hall, in the city and county of San Francisco, State of California, on Monday, the 12th day of January, A. D. 1885, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order requiring defendant herein to pay alimony and counsel fees to plaintiff and her attorneys and counsel herein.

"Said motion will be made on the ground that the plaintiff herein is wholly without income to prosecute her suit and pay her ordinary expenses.

52 "Said motion will be supported by the affidavits hereto annexed and made part hereof, copies of which are herewith served upon you, and the pleadings, papers, records, and proceedings in the above-entitled cause on file herein.

"Respectfully, TYLER & TYLER,
"*Attorneys for Plaintiff.*

"Dated January 3d, 1885."

That the affidavits mentioned in said notice were those of said plaintiff and W. B. Tyler, one of her attorneys; that the affidavit of said Tyler (omitting the title of court and cause) is in the following words and figures, to wit:

"STATE OF CALIFORNIA, }
"*City and County of San Francisco,* } *ss:*

"W. B. Tyler, being first duly sworn, deposes and says that he is an attorney and counsellor at law, duly admitted and licensed by the supreme court of the State of California; that he is one of the attorneys employed by the plaintiff in the above-entitled suit, and is familiar with the services rendered in the preparation and trial of said cause; that the attorneys employed in said suit by said plaintiff were George W. Tyler and William B. Tyler; that David S. Terry, Flournoy, Mhoon & Flournoy, Walter H. Levy, Clement, Osment & Clement were employed as counsel in said cause and in the causes growing out of the same, and neither of said attorneys or counsel have been paid anything as yet for their services rendered or to be rendered in said cause; that the labor of preparing said case for trial was very great, and that the trial of said cause occupied several months and called for great diligence and exertion.

"That said attorneys and said counsel, save and except the firm of Clement, Osment & Clement, were actually engaged in the
53 trial of said cause; that the said firm of Clement, Osment & Clement rendered valuable assistance in the preparation of said case and during the trial of the same.

"That the services rendered by said attorneys and said counsel in and about the preparation and trial of said case were of great value, and were and are reasonably worth the sum of one hundred and fifty thousand ($150,000) dollars; and further deponent saith not.

"W. B. TYLER.

"Subscribed and sworn to before me this 2d day of January, A. D. 1885.

"[SEAL.] LEWIS B. HARRIS,
"*Notary Public.*"

That the aforesaid affidavit of said plaintiff (omitting the title of court and cause) is in the following words and figures, to wit:

"STATE OF CALIFORNIA,
"*City and County of San Francisco,* } *ss:*

"Sarah Althea Sharon, being first duly sworn, deposes and says that she is the plaintiff above named and that she is the wife of the defendant above named; that the defendant herein is a man of large means, and, as plaintiff is informed and believes and so charges the fact to be, is now worth the sum of fifteen million ($15,000,000) dollars, and defendant's income, as plaintiff is informed and believes, is and has been since the commencement of this suit one hundred thousand ($100,000) dollars per month, all of which is under the absolute control of the defendant.

"Deponent further alleges that she is now and has been ever since she was deserted by her said husband on the 25th day of November, A. D. 1881, entirely without means to prosecute her suit or pay her ordinary expenses during the pendency of said action.

54 "Deponent further alleges that she has been compelled to employ counsel to prosecute her said suit, and that she is informed and believes that the sum of one hundred and fifty thousand ($150,000) dollars is a reasonable sum to be paid to her said counsel, and that the sum of ten thousand ($10,000) dollars per month is reasonable sum for allowance to the plaintiff as alimony from the 25th day of November, A. D. 1881.

"And further deponent saith not.

"S. A. SHARON.

"Subscribed and sworn to before me this 8th day of January, A. D. 1885.

"[SEAL.] LEWIS B. HARRIS,
"*Notary Public.*"

That said motion for alimony and counsel fees was heard by said superior court, and said court, on February 16th, 1885, granted said motion by the making of an entry of its judgment in the following words and figures, to wit:

"SARAH A. SHARON *vs.* WILLIAM SHARON.

"MONDAY, *February* 16, 1885.

"It is hereby ordered that the defendant pay to the plaintiff or her order on or before the ninth day of March, 1885, the sum of seven thousand five hundred dollars as alimony herein, and the further sum of twenty-five hundred dollars on or before the eighth day

of April, 1885, and the same amount on or before the eighth day of each and every month thereafter as alimony until the further order of this court.

"It is further ordered that the defendant pay as counsel fees herein on or before the eighth day of March, 1885, the sum of fifty-five thousand dollars—that is to say, twenty thousand dollars to Messrs. Tyler & Tyler or order; ten thousand dollars to
55 George Flournoy or order; ten thousand dollars to Walter Levy or order; ten thousand dollars to David S. Terry or order, and five thousand dollars to R. P. Clement or order; and in case any of such payments are not made on or before the time herein fixed, then the party or the parties entitled thereto shall have execution therefor, pursuant to section 1007 of the Code of Civil Procedure of the State of California."

That thereafter William Sharon, the defendant in said action, appealed from said order or judgment to the supreme court of the State of California, and that the said supreme court, after the hearing of said appeal, on the 31st day of January, 1888, made the following decision upon said appeal:

"The judgment or order appealed from (made and entered the sixteenth day of February, 1885), directing the payment of alimony to the plaintiff and the payment of counsel fees, is modified by striking out therefrom the words 'the sum of $7,500 as alimony herein and the further sum of $2,500 on or before the eighth day of April, 1885,' and inserting in the stead and place of those words 'the sum of $1,500 alimony herein and the further sum of $500 on or before the eighth day of April, 1885;' and the judgment or order appealed from (so as aforesaid made and entered on the sixteenth day of February, 1885) is further modified by striking out therefrom the portion thereof which reads, 'It is further ordered that the defendant pay as counsel fees herein on or before the ninth day of March, 1885, the sum of fifty-five thousand dollars—that is to say, twenty thousand dollars to Messrs. Tyler & Tyler or order; $10,000 to George Flournoy or order; $10,000 to Walter Levy or order; $10,000 to David S. Terry or order, and $5,000 to R. P. Clem-
56 ent or order; and in case any of such payments are not made on or before the time herein fixed, then the party or parties entitled thereto shall have execution therefor, pursuant to section 1007 of the Code of Civil Procedure of the State of California,' and the portion of said order of February 16, 1885, so as aforesaid providing for the payment of counsel fees is hereby ordered reversed."

And affiant further states, upon his information and belief, that it is now claimed by the plaintiff in said action, and was claimed at and before the filing of the original bill herein on October 3d, 1883, and has at all times since been claimed by her, that there is community property of the marriage alleged between herself and the said William Sharon which equals in value the sum of ten millions ($10,000,000) dollars, and that she is entitled to one-half of said community property under and by virtue of her said marriage and

the judgment of said superior court entered in said action, as appears from the aforesaid judgment-roll.

And affiant further states that the matter in dispute in this cause has always exceeded the sum or value of five hundred dollars, exclusive of interest and costs; that, as affiant states according to his best information and belief, the property of said William Sharon possessed by him before and at the time of said suit was of the value of five million ($5,000,000) dollars over and above all his debts and liabilities; that the said defendant, Sarah Althea Hill, at all the times during said cause of Sharon *vs.* Hill claimed all the rights of a wife under the laws of the State of California in and to the property and property rights of said complainant, William Sharon, and to a reasonable support from him, as her husband, and to a share of the property acquired by him after the date of the alleged marriage; and affiant further states that said support was of the value
57 of at least five hundred dollars per month, if said Sarah Althea Hill was in fact the wife of said William Sharon, as claimed by her in her answer in said cause of Sharon *vs.* Hill, and that her claim of right to a reasonable support from said complainant, William Sharon, was in controversy in said suit, and that all said claims of said Sarah Althea Hill as the wife of said William Sharon and to a reasonable support from him as her husband and to an interest in his property as community property were wholly disputed as false and fraudulent by said William Sharon in and by said suit, and is now disputed by his personal representatives, heirs, and successors in interest, and that said matters in dispute, exclusive of interest and costs, at all times exceeded the sum or value of two thousand dollars.

And affiant further states that it was the object of said suit of Sharon *vs.* Hill to protect the property and property rights of said William Sharon and his estate, exceeding in value the sum of five million ($5,000,000) dollars, against all of said claims or any claim of said Sarah Althea Hill, and that all of said claims were substantially in dispute in said suit.

JAMES M. ALLEN.

Subscribed and sworn to before me this 5th day of July, A. D. 1888.

[SEAL.] JAMES MASON,
Notary Public.

58 "EXHIBIT A."

Complaint.

STATE OF CALIFORNIA,
City and County of San Francisco:

In the Superior Court.

SARAH ALTHEA SHARON, Plaintiff,
vs.
WILLIAM SHARON, Defendant.

Plaintiff complains of said defendant and for cause of action against him avers and shows to the court as follows:

I.

That for more than six months last past the plaintiff and the defendant have resided and do now reside in the city and county of San Francisco, State of California.

II.

That on the 25th day of August, 1880, the plaintiff and defendant became, by mutual agreement, husband and wife, and thereafter plaintiff and defendant commenced living and cohabiting together as husband and wife.

III.

That on the said 25th day of August, 1880, at said city and
59 county—and inasmuch as said marriage had not been solemnized in the mode provided by section 70 of the Civil Code of California—the plaintiff and defendant jointly made a declaration of marriage in writing, signed by each of them, substantially in form as required by section 75 of the Civil Code of California, and until the month of November, 1881, the plaintiff and defendant lived and cohabited together in said city and county as husband and wife.

IV.

That on or about the 25th day of November, 1881, the defendant demanded of plaintiff a surrender to him of said declaration of marriage, and threatened plaintiff with personal violence in case she refused to comply with such demand; refused to recognize his said marriage with plaintiff; drove the plaintiff away from him, and refused to live or cohabit with her unless she complied with his demand; and the defendant for more than one year last past has not lived with plaintiff, nor has he requested her to return to and live with him, thereby willfully deserting the plaintiff.

Second.

For another, further, and separate cause of action against the defendant, this plaintiff refers to and repeats the allegations of the first cause of action, hereinbefore set forth, numbered, respectively, "1," "2," and "3," and further alleges, upon information and belief, as follows:

I.

That on or about the 28th day of June, 1881, at the city and county of San Francisco, the defendant, while so the lawful husband of this plaintiff, had voluntary sexual intercourse with a woman known by the name of Gertie Dietz, but whose real first name is unknown to this plaintiff.

60

II.

In like manner plaintiff further alleges that on divers other days since the 28th day of June, 1881, and prior to the commencement of this suit, at said city and county, the defendant has had voluntary sexuel intercourse with the same person known as Gertie Dietz, but upon what dates and at what particular places plaintiff is unable more particularly to set forth or allege; all of which said several acts of adultery came to the knowledge of plaintiff within two years last past.

Third.

For another, further, and separate cause of action against the defendant plaintiff refers to and repeats the allegations numbered, respectively, "1," "2," and "3" in the first cause of action hereinbefore set forth, and further alleges, upon information and belief, as follows:

I.

That on or about the 20th day of August, 1881, at the city and county of San Francisco, the defendant, while so the lawful husband of this plaintiff, had voluntary sexual intercourse with a woman known by the name of May Dietz, *alias* May Rey, the wife of Ferdinand Dietz.

II.

In like manner plaintiff alleges that at divers other times between the 20th day of August, 1881, and the commencement of this suit, said defendant, at the city and county of San Francisco, had voluntary sexual intercourse with said May Dietz, *alias* May Rey, the wife of Ferdinand Dietz, but upon what dates and at what particular places plaintiff is unable more particularly to set forth or
61 allege; the knowledge of all which acts of adultery have become known to plaintiff within two years last past.

Fourth.

For another, further, and separate cause of action against the defendant this plaintiff refers to and repeats the allegations numbered, respectively, "1," "2," and "3" in the first cause of action hereinbefore set forth, and further alleges, upon information and belief, as follows:

I.

That on or about the first day of January, 1882, at the city and county of San Francisco, the defendant, while so the lawful husband of plaintiff, had voluntary sexual intercourse with a woman by the name of Sophia Machoniche, *alias* Sophia Whiting.

II.

In like manner plaintiff alleges that at divers other times, at said city and county, during the year 1882, the said defendant had voluntary sexual intercourse with the said Sophia Machoniche, *alias* Sophia Whiting, but upon what dates or at what particular places plaintiff is unable more particularly to set forth or allege.

Fifth.

For another, further, and separate cause of action against said defendant this plaintiff refers to and repeats the allegations of the first cause of action, hereinbefore set forth, numbered, respectively, "1," "2," and "3," and, in addition thereto, alleges, upon information and belief, as follows:

I.

That on or about the 20th day of January, 1882, at the city
62 and county of San Francisco, the defendant, while so the lawful husband of this plaintiff, had voluntary sexual intercourse with a woman by the name of Kate Colter, formerly Kate Riley, the ward of said defendant.

II.

In like manner plaintiff alleges that at divers other times during the year 1881, at the city and county of San Francisco, the defendant had voluntary sexual intercourse with the said Kate Colter, formerly Kate Riley, but at what particular dates or at what places plaintiff is unable more particularly to set forth or allege; the knowledge of all which acts of adultery have become known to plaintiff within two years last past.

Sixth.

For another, further, and separate cause of action against the defendant the plaintiff refers to and repeats the allegations numbered, respectively, "1," "2," and "3," in the first cause of action, hereinbefore set forth, and further, upon information and belief, alleges as follows:

I.

That on or about the first day of August, 1881, at the city and county of San Francisco, the defendant, while so the lawful husband of plaintiff, had voluntarily sexual intercourse with a woman by the name of Mamie Riley, the ward of said defendant.

II.

In the same manner plaintiff alleges that at divers other times during the year 1881, at said city and county, the defendant had voluntary sexual intercourse with the said Mamie Riley, but at what dates and at what particular places plaintiff is unable to more particularly set forth or allege; the knowledge of all which acts of adultery have become known to plaintiff within two years last past.

63

Seventh.

For another, further, and separate cause of action against defendant the plaintiff refers to and repeats the allegations of the first cause of action, hereinbefore set forth, numbered, respectively, "1," "2," and "3," and further alleges, upon information and belief, as follows:

I.

That on or about the first day of March, 1882, at the city and county of San Francisco, the said defendant, while so the lawful husband of this plaintiff, had voluntary sexual intercourse with a woman by the name of Kate Dunne.

II.

In like manner plaintiff alleges that at divers other times since said first day of March, 1882, at the city and county of San Francisco, and prior to the commencement of this suit, the defendant had voluntary sexual intercourse with the said Kate Dunne, but upon what dates or at what particular places plaintiff is unable more particularly to set forth or allege.

Eighth.

For another, further, and separate cause of action against the defendant the plaintiff refers to and repeats the allegations of the first cause of action, hereinbefore set forth, numbered, respectively, "1," "2," and "3," and further alleges, upon information and belief, as follows:

64

I.

That on or about the first day of June, 1882, at the Palace Hotel, in the city and county of San Francisco, the said defendant, while so the lawful husband of this plaintiff, had voluntary sexual intercourse with a woman by the name of Jane Doe Eads, whose real first name is unknown to this plaintiff.

II.

In like manner plaintiff alleges that at divers other times during the months of June and July, 1882, at the Palace Hotel, in said city and county, the defendant had voluntary sexual intercourse with the said Jane Doe Eads, but upon what particular dates plaintiff is unable more particularly to set forth or allege.

Ninth.

For another, further, and separate cause of action against the defendant this plaintiff refers to and repeats the allegations of the first cause of action hereinbefore set forth, numbered, respectively, "1," "2," and "3," and further alleges, upon information and belief, as follows:

I.

That on or about the first day of January, 1883, at the Palace Hotel, in the city and county of San Francisco, the said defendant, while so the lawful husband of this plaintiff, had voluntary sexual intercourse with a woman by the name of Delia Hogan.

II.

In like manner plaintiff alleges that at divers other times since the first day of January, 1883, and prior to the commence-
65 ment of this suit, at said Palace Hotel, in said city and county, the said defendant had voluntary sexual intercourse with the said Delia Hogan, but upon what particular dates this plaintiff is unable more particularly to set forth or allege.

Tenth.

For another, further, and separate cause of action against the defendant this plaintiff refers to and repeats the allegations of the first cause of action, hereinbefore set forth, numbered "1," "2," and "3," and further alleges, upon information and belief, as follows:

I.

That on or about the first day of May, 1883, at the city and county of San Francisco, the said defendant, while so the lawful husband of plaintiff, enticed away from the protection of her guardian, John Dunne, a young girl, less than eighteen years of age, by the name of May Dunne, and had voluntary sexual intercourse with her, and has, since that time, supported her and kept her away from her said guardian, and has, at divers other times since the first day of May, 1883, and prior to the commencement of this suit, had voluntary sexual intercourse with said May Dunne, but at what dates and at what particular places this plaintiff is unable more particularly to set forth or allege.

Plaintiff further alleges, upon information and belief, that when plaintiff and defendant intermarried the defendant was greatly in

debt and did not have in money or property at that time more than five millions of dollars ($5,000,000), and his income did not then exceed the sum of thirty thousand dollars ($30,000) per month, and that since such intermarriage plaintiff and defendant have, by their prudent management of mines, fortunate speculations, manipulations of the stock market, and other business enterprises, ac-
66 cumulated in money and property more than ten millions of dollars ($10,000,000), so that now the defendant has in his possession or under his control money and property to the value of at least fifteen millions of dollars ($15,000,000), from which he receives an income of over one hundred thousand dollars per month.

Wherefore plaintiff prays that her marriage with said defendant may be declared legal and valid by this honorable court; that she may be divorced from said defendant.

That an account be taken of all the business transactions of plaintiff and defendant since their said marriage to ascertain the amount of the common property of plaintiff and defendant, and that the same may, by the decree of this hon. court, be equally divided between them, and for such other or further or different relief as may be just, and for costs.

TYLER & TYLER,
Attorneys for Plaintiff.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

Sarah Althea Sharon, being duly sworn, deposes and says that she is the plaintiff in the above-entitled action; that she has heard read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge except as to those matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

SARAH ALTHEA SHARON.

Subscribed and sworn to before me this 31st day of October, A. D. 1883.

[SEAL.]

LEWIS B. HARRIS,
Notary Public.

Endorsed: Filed Nov. 1st, 1883. William T. Sesnon, clerk, by J. D. Ruggles, deputy clerk.

67 *Answer.*

(Title of court and cause.)

Now comes the defendant, William Sharon, by William H. L. Barnes, his attorney, and for answer to the complaint of Sarah Althea Hill, falsely calling herself Sarah Althea Sharon, respectfully shows to the court and alleges as follows:

I.

The defendant admits that for more than six months last past he has been and now is temporarily resident in the city and county of San Francisco, State of California, and alleges that during all the times mentioned in said complaint he has been and now is a citizen of the State of Nevada.

II.

He denies that on the 25th day of August, 1880, or at any other time the plaintiff and defendant became by mutual agreement or otherwise husband and wife, or that thereafter or ever the plaintiff and defendant commenced living or cohabiting together as husband and wife, or ever did so live and cohabit.

III.

He denies that on the said 25th day of August, 1880, or at any other time, at the city and county of San Francisco or elsewhere, or inasmuch as said alleged marriage had not been solemnized in the mode provided by section 70 of the Civil Code of California, the plaintiff and defendant jointly or otherwise made a declaration of marriage in writing or otherwise, signed by either of them, substantially or otherwise in form as required by section 75 of the Civil Code of California or otherwise, or until the month of November, 1881, or at any other time, the plaintiff and defendant lived or cohabited together in said city and county or elsewhere as husband and wife.

68

IV.

He denies that on or about the 25th day of November, 1881, or at any other time, he demanded of the plaintiff a surrender to him of said alleged declaration of marriage, or threatened plaintiff with personal or other violence in case she refused to comply with such demand, or at all, or refused to recognize or was ever requested by the plaintiff to recognize said alleged and pretended marriage with her. He denies that he drove the plaintiff away from him, or that she was ever with him, or that he refused to live or cohabit with her unless she complied with his alleged demand. On the contrary, the defendant alleges that he never knew or heard of the existence of said alleged declaration of marriage prior to the time mentioned in said complaint, or ever after until within sixty days last past.

He admits that for more than one year last past he has not lived with the plaintiff nor has he requested her to return to and live with him. He denies that he has ever willfully deserted the plaintiff or that he has ever lived with the plaintiff at any time or at any place, as husband and wife or otherwise.

And defendant, further answering, says that within sixty days last past the said plaintiff, whose real name is Sarah Althea Hill, but who has falsely and fraudulently assumed and pretended to bear the name of Sarah Althea Sharon, has, in some manner unknown

to the defendant, falsely and fraudulently forged or procured to be forged a document purporting to be a declaration or statement of marriage between the plaintiff and the defendant, and has on divers occasions, in the city and county of San Francisco,
69 uttered the same, and caused the same to be published in divers newspapers in the city and county of San Francisco; that this defendant never signed the document referred to in the complaint or any document wherein or whereby he agreed to marry the plaintiff, or ever did in fact marry her; and that all and singular the statements, declarations, and pretenses of the plaintiff in that behalf are willfully false, and well known by her so to be.

V.

And, with respect to the second alleged cause of action in said complaint contained, this defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

VI.

And, with respect to the third alleged cause of action in said complaint contained, this defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

VII.

And, with respect to the fourth alleged cause of action in said complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

VIII.

And, with respect to the fifth alleged cause of action in said complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of
70 action in the complaint contained, numbered, respectively, I, II, III, and IV.

IX.

And, with respect to the sixth alleged cause of action in said complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

X.

And, with respect to the seventh alleged cause of action in said complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of

action in the complaint contained, numbered, respectively, I, II, III, and IV.

XI.

And, with respect to the eighth alleged cause of action in said complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

XII.

And, with respect to the ninth alleged cause of action in said complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

XIII.

And, with respect to the tenth alleged cause of action in said
71 complaint contained, the defendant repeats and renews the matter hereinbefore stated in respect to the allegations of the first cause of action in the complaint contained, numbered, respectively, I, II, III, and IV.

XIV.

And with respect to the II, III, IV, V, VI, VII, VIII, IX, and X alleged causes of action the defendant alleges as follows:

He denies that he is or ever was the lawful husband of the plaintiff as in said several separate causes of action and each of them is alleged.

XV.

And, further answering, the defendant denies that the plaintiff and defendant ever intermarried, as alleged in said complaint or otherwise.

He denies that since said alleged intermarriage or at all plaintiff and defendant have, by the prudent management of mines or fortunate speculations or manipulations of the stock market or other business enterprises accumulated money or property more than ten millions of dollars, or that the plaintiff ever had or acquired, by either marriage or otherwise, any right, title, or interest of any name, nature, or description in or to the property of this defendant.

Wherefore the defendant prays that the prayer of said complaint may be denied, and that it be adjudged and decreed that the plaintiff is not and never was the wife of this defendant, and that she is not now and never was entitled to be divorced from him; that her prayer that an account be taken of all the alleged business transactions of plaintiff and defendant since the said pretended marriage may be denied, and that it be ordered and adjudged that the plaintiff has no right or claim, legal or equitable, to any property or share in any proportion of any property, real or personal, of which
72 the defendant may be possessed, and that he may have such

other and further order, judgment, and relief in the premises as may be just and the circumstances of the case may require.

W. H. L. BARNES,
Attorney for Defendant.

STATE OF CALIFORNIA. }
City and County of San Francisco, } *ss:*

William Sharon, being duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

WM. SHARON.

Subscribed and sworn to before me this 10th day of November, A. D. 1883.

[NOTARIAL SEAL.] C. H. JACKSON,
Notary Public.

(Endorsed:) Filed Nov. 10th, 1883. William T. Sesnon, clerk, by A. J. Raisch, deputy clerk.

Stipulation.

(Title of court and cause.)

It is hereby stipulated and agreed by and between the respective parties to this suit that the above-entitled cause may be assigned to department two of said court and tried by Hon. J. F. Sullivan without a jury.

Dec. 3, 1883.

TYLER & TYLER,
Attorneys for Plaintiff.
W. H. L. BARNES,
Attorney for Defendant.

(Endorsed:) Filed Jan. 3d, 1884. William T. Sesnon, clerk, by W. G. Burke, deputy clerk.

73 *Order Transferring Cause for Further Hearing.*

(Title of court and cause.)

I hereby consent that the above-entitled cause, pending before me in department No. 3, be transferred to Judge J. F. Sullivan (dep't 2) for hearing.

JNO. F. FINN, *Judge.*

Ordered, upon the stipulation hereto annexed, that the above-

entitled cause be transferred to Hon. J. F. Sullivan, judge, for the hearing of all further proceedings.

Dated this 3d day of January, 1884.

JOHN HUNT,
Presiding Judge.

(Endorsed:) Filed January 3d, 1884. Wm. T. Sesnon, clerk, by W. G. Burke, deputy clerk.

Amended Answer.

(Title of court and cause.)

Now comes the defendant and, by leave of court first had and obtained, amends his answer in the following particulars, to wit:

By substituting in the place and stead of paragraph 15 of said answer the words and figures as follows, to wit:

And, further answering, the defendant denies that plaintiff and defendant ever intermarried as alleged in said complaint or otherwise.

He denies that since said alleged intermarriage or at any time or at all plaintiff and defendant have, by their prudent or any
74 management of mines or fortunate or any speculation or manipulations of the stock market or other business enterprises or at all, accumulated, in either money or property or both, more than or as much as ten millions of dollars or any other sum, or that plaintiff ever had or acquired, by either marriage or otherwise, any right, title, or interest of any name, nature, or description in or to the property owned or possessed by this defendant or owned, possessed, or controlled by him at any time since the 25th day of August, A. D. 1880, or at all.

He denies that he has now, or has been since the 25th day of August, 1880, the owner of, or has had at any time since said date in his possession or under his control money and property, or either, of the value of fifteen millions of dollars, or any other sum greater than five million dollars net, from which he receives an income of over one hundred thousand dollars per month, or any other sum greater than thirty thousand dollars net.

He denies that he now has or has had at any time since the 25th day of August, A. D. 1880, an income of over one hundred thousand dollars per month, or any other sum exceeding the sum of thirty thousand dollars per month net.

W. H. L. BARNES,
Attorney for Defendant.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

William Sharon, being duly sworn, deposes and says:

I am the defendant in the above-entitled cause. I have heard

read the foregoing amendments to my answer in said cause and know the contents thereof, and that the same is true of my own knowledge.

San Francisco, Cal., Jan. 3, 1885.

WM. SHARON.

75 Subscribed and sworn to before me this 3d day of January, 1885.

[SEAL.] C. H. JACKSON,
Notary Public.

(Endorsed:) Filed Jan. 5th, 1885. James J. Flynn, clerk, by J. J. Farrell, deputy clerk.

Findings of Fact.

(Title of court and cause.)

This cause came on for trial before Hon. J. F. Sullivan, judge of said court, a jury having been waived by the respective parties and both parties have stipulated to try said cause before said judge on the 10th day of March, 1884, and the trial thereof was continued from time to time until the 17th day of September, 1884, when the same was submitted for decision and taken under advisement by the court.

Now, on this 18th day of February, A. D. 1885, after mature deliberation, the court finds from the testimony in said cause the following facts:

First.

That for more than six months prior to the commencement of this suit the plaintiff and defendant were residents of the city and county of San Francisco, State of California.

Second.

That on the 25th day of August, A. D. 1880, the plaintiff and defendant each signed a certain declaration of marriage in the words and figures following, to wit:

76 In the city and county of San Francisco, State of California, on the 25th day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, State of California, aged 27 years, do here, in the presence of Almighty God, take Senator William Sharon, of the State of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the State of Nevada.

August 25th, 1880, San Francisco, Cal.

SARAH ALTHEA HILL.

I agree not to make known the contents of this paper or its exist-

ence for two years, unless Mr. Sharon himself see fit to make it known.

S. A. HILL.

In the city and county of San Francisco, State of California, on the 25th day of August, A. D. 1880, I, Senator William Sharon, of the State of Nevada, aged 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city of San Francisco, Cal., to be my lawful and wedded wife, & do here acknowledge myself to be the husband of Sarah Althea Hill.

Nevada, August 25th, 1880.

WILLIAM SHARON.

Which was the only written declaration, contract, or agreement of marriage ever entered into between said parties, and at the time of signing said declaration plaintiff and defendant mutually agreed to take each other as, and henceforth to be to each other, husband and wife.

Third.

That afterwards and about the — day of September, 1880, the plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabi-
77 tation was kept secret, and so continued for the space of more than one year and down to the 25th day of November, 1881, and during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations.

Fourth.

That during all the time plaintiff and defendant so lived together defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families and to members of his own family, and wrote to her several letters while absent from her, in which he addressed her as "My dear wife."

Fifth.

From the foregoing facts the court finds that plaintiff and defendant intermarried in August, 1880, and that the allegations of paragraphs two and three of the complaint as to the fact of marriage are true, except in so far as the declaration therein referred to is alleged to be in compliance with section 75 of the Civil Code of this State.

Sixth.

The defendant, on or about Dec. 6th, 1881, drove plaintiff from her apartments in his hotel in which she had resided by his directions since September, 1880, and which was the residence selected for her by the defendant, refused to longer live with or provide for her support, and has not since then lived with or sought to live with or re-

quested the plaintiff to return or live with him or provide in any manner for her support.

Seventh.

That no proof was offered of either charge of adultery in the complaint, the same being on the trial deemed withdrawn by mutual consent.

78

Eighth.

That it is not true, as stated in the answer of defendant, that plaintiff has either falsely or fraudulently assumed the name of Sarah Althea Sharon, but, on the contrary, that it is her real name; nor is it true that she or any one forged the document mentioned in the complaint and heretofore set out; on the contrary, the said document is genuine and was signed by the plaintiff and defendant at the time it purports to have been signed.

Ninth.

That defendant never introduced plaintiff as his wife nor spoke of her as such in the presence of other persons; that plaintiff never introduced defendant as her husband nor spoke to nor of him to other persons in his presence as her husband; that the parties were never reputed among their mutual friends to be husband and wife, nor was there at any time any mutual, open recognition of such relationship by the parties, nor any public assumption by the parties of the relation of husband and wife.

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds—

First.

That plaintiff and defendant are and have been since August 25th, 1880, husband and wife.

Second.

That on or about the twenty-fifth day of November, 1881, the defendant willfully deserted the plaintiff, and such desertion has continued from thence hitherto.

79

Third.

That plaintiff, by reason of defendant's desertion of her, is entitled to a decree of divorce from the defendant, dissolving the bonds of matrimony now existing between them.

Fourth.

That plaintiff is entitled to one-half the common property accumulated by plaintiff and defendant since August 25th, 1880, and to an accounting with the defendant to ascertain the same, and upon the coming in of the report of the master or referee taking said account to a final decree herein.

In the meantime plaintiff is entitled to a decree of divorce, to be entered at once upon these findings, in which her right to an accounting shall be preserved.

J. F. SULLIVAN,
Judge of said Court.

(Endorsed:) Filed February 18th, 1885. Jas. J. Flynn, clerk, by H. Hart, dep. clerk.

Decree of Divorce.

(Title of court and cause.)

The above-entitled cause having been tried by said court sitting without a jury, a jury having been duly waived by the attorneys for the respective parties by stipulation, and said cause having been submitted to the court upon the charge of desertion, the charges of adultery having been withdrawn upon the trial, and the court having made and filed its findings of fact and conclusions of law herein, by which it found that plaintiff and defendant intermarried in August, 1880, and that the defendant willfully deserted the plaintiff in December, 1881, and that plaintiff is entitled to an
80 accounting with defendant to ascertain the common property:

Now, therefore, on motion of Messrs. Tyler & Tyler, attorneys for plaintiff, it is ordered, adjudged, and decreed that the plaintiff and defendant are husband and wife, and that the marriage now existing between the plaintiff, Sarah Althea Sharon, and the defendant, William Sharon, be, and the same is hereby, dissolved, and the said parties are and each of them is freed from the obligations thereof.

It is further ordered, adjudged, and decreed that plaintiff is entitled to one-half of all the common property acquired by plaintiff and defendant or either of them since the 25th day of August, A. D. 1880, the date of their marriage, and that in order to ascertain what is community property an account be taken by M. C. Blake, Esq., who is hereby appointed referee for that purpose, of all property acquired by either party since August 25, 1880, and what part of the same is common property.

It is further ordered, adjudged, and decreed that said account be taken and stated with all convenient dispatch and reported to the court for further action, and that said referee report to the court the testimony taken before him in the taking of said account.

It is further ordered, adjudged, and decreed that the question of property be, and the same is hereby, reserved for future considera-

tion, and upon the coming in of the referee's report plaintiff has leave to apply for a further and final decree settling the matter of property as between the parties, and in case there should not be sufficient community property so that the one-half thereof would be amply sufficient to provide for the support and maintenance of the plaintiff suitable to her station in life she has leave to apply to the court for provision for such support and maintenance and for counsel fees out of the separate property of the defendant.

81 It is further ordered, adjudged, and decreed that plaintiff recover her costs incurred in the trial of said cause up to the present time, taxed at $1,489.75.

J. F. SULLIVAN,
Judge of said Court.

Decree recorded February 19th, 1885, B. 3, p. 254, D. 3.
Filed February 19th, 1885.

JAS. J. FLYNN, *Clerk*,
By H. HART, *Dep. Clerk.*

CITY AND COUNTY OF SAN FRANCISCO, *ss*:

(Title of court and cause.)

I, Jas. J. Flynn, county clerk of the city and county of San Francisco, State of California, and *ex officio* clerk of the superior court thereof, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled cause and recorded in Judgment Book 3 of said court, at page 254, department No. 3; and I further certify that the foregoing papers hereto annexed constitute the judgment-roll in said cause.

Witness my hand and seal of said superior court this 19th day of February, A. D. 1885.

JAS. J. FLYNN, *Clerk*,
By J. T. HARRISON,
Deputy Clerk.

(Endorsed:) Judgment-roll. Filed February 19th, 1885. Jas. J. Flynn, clerk, by J. T. Harrison, deputy clerk. Recorded Judgment Book 3, page 254.

Endorsed: Service of within notice of motion & affidavits is hereby admitted this 5th day of July, A. D. 1888. Stanly, Stoney & Hayes, solicitors for defendant. Filed July 6th, 1888. L. S. B. Sawyer, clerk.

82 When a Federal court and a State court may each take jurisdiction of the same subject-matter and parties, the tribunal whose jurisdiction first attaches will retain it to the final determination of the controversy, either to the entire exclusion of the other tribunal or to its exclusion so far as to render its decision subordinate.

Opinion of the Circuit Court of the United States for the Northern District of California, Delivered at San Francisco, September 3, 1888, *by Mr. Justice Field.*

(Printed from the official copy.)

83 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

FREDERICK W. SHARON, as Executor, Complainant, *vs.* DAVID S. TERRY and SARAH ALTHEA TERRY, His Wife, Defendants.	Bill of Revivor in Equity.
FRANCIS G. NEWLANDS, as Trustee, *et al.*, Complainants, *vs.* DAVID S. TERRY and SARAH ALTHEA TERRY, His Wife, Defendants.	Bill in Equity, in the Nature of a Bill of Revivor and Supplement, and to Carry Decree into Execution.

Before Field, circuit justice; Sawyer, circuit judge, and Sabin, district judge.

1. Upon proceedings to revive a suit in equity abated by the death of the complainant for the purpose of executing a final decree
84 which has been rendered in such suit no objections can be taken which could have been urged when the original bill was pending, except want of jurisdiction apparent upon the record. An attack upon a judgment or decree in a proceeding to revive it is a collateral attack, and can only avail when there is a want of jurisdiction either of the parties or of the subject-matter.
2. The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract, if genuine and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract within the meaning of the acts of Congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute

such amount or value when necessary to the jurisdiction may be shown by the evidence produced in the case or by affidavits filed when the question of jurisdiction is raised.

3. The right of action to cancel a marriage contract, which, if genuine and followed by the requisite consummation as mentioned above, would create rights in the property of the alleged husband, survives to his executor or administrator.

4. The transfer of the property of the plaintiff in a suit to cancel a forged marriage contract while such suit is pending does not abate it if the plaintiff retain a right during his life to claim the rents and profits thereof, and the purchasers or beneficiaries under such transfer are entitled to the benefit of the decree rendered in such suit cancelling the contract to protect the property from claims made under or by virtue of it.

5. Where the jurisdiction of the circuit court of the United States has attached in a suit brought by a citizen of a State other than that in which the court is held the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated, or impaired by any subseqent action or proceeding of the defendant respecting the same subject-matter in a State court.

6. Where different courts may entertain jurisdiction of the same subject the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy either to the entire exclusion of the other or to the exclusion so far as to render the latter's decision subordinate to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree.

7. The exceptions to the rule that priority of jurisdiction controls priority of decision are, first, where the same plaintiff has asked in different suits a determination of the same matter, and, second, where the cases are upon contracts or obligations which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.

8. The decree of a circuit court of the United States cancelling a forged marriage contract may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a State court.

9. Section 720 of the Revised Statutes, prohibiting injunctions by any court of the United States to stay proceedings in a State court, does not apply where the Federal court has first obtained jurisdiction of the subject-matter of the proceedings and of the parties in the State court. This section must be construed in connection with section 716 of the Revised Statutes, which provides that the Federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

86 *Statement of the Cases.*

These cases are brought to revive and carry into execution a final decree of this court in the suit of William Sharon *vs.* Sarah Althea Hill, entered as of the 29th day of September, 1885. On the 3d day of October, 1883, William Sharon, a citizen of the State of Nevada, since deceased, instituted in the circuit court of the United States for the district of California a suit in equity against Sarah Althea Hill, now Sarah Althea Terry, to obtain its decree adjudging a certain paper in her possession purporting to be a declaration of marriage between them to be a forgery and enjoining its use and directing its cancellation.

In his complaint, after stating his citizenship in Nevada and the citizenship of the defendant in California, he set forth in substance this: That he was and had been for some years an unmarried man; that formerly he was the husband of Maria Ann Sharon, who died in May, 1875, and that he had never been the husband of any other person; that there were two children living, the issue of that marriage, and also grandchildren, the children of a deceased daughter of the marriage; that he was possessed of a large fortune in real and personal property, was extensively engaged in business enterprises and ventures, and had a wide business and social connection; that, as he was informed, the defendant was an unmarried woman of about thirty years of age, for some time a resident of San Francisco; that within two months then past she had repeatedly and publicly claimed and represented and then declared and represented that she was his lawful wife; that she falsely and fraudulently pre-
87 tended that she was duly married to him on the 25th day of August, 1880, at the city and county of San Francisco: that on that day they had jointly made a declaration of marriage, showing the names, ages, and residences of the parties, jointly doing the acts required by section 75 of the Civil Code of California to constitute a marriage between them, and that thereby they became and were husband and wife according to the law of that State.

The complainant further alleged that these several claims, representations, and pretensions were wholly and maliciously false and were made by her for the purpose of injuring him in his property, business, and social relations, for the purpose of obtaining credit by the use of his name with merchants and others, and thereby compelling him to maintain her, and for the purpose of harassing him and, in case of his death, his heirs and next of kin and legatees into payment of large sums of money to quiet her false and fraudulent claims and pretenses. He also set forth what he was informed was a copy of the declaration of marriage, and alleged that if she had any such instrument it was "false, forged, and counterfeited;" that he never on the day of its date or at any other time made or executed such document or declaration and never knew or heard of the same until within a month previous to that time, and that the same was null and void as against him and ought in equity and good conscience to be so declared and ordered to be delivered up, to be annulled and cancelled.

The complaint concluded with a prayer that it be adjudged and decreed that the said Sarah Althea Hill was not and never had been the wife of the complainant; that he did not make the said joint declaration of marriage or any marriage between them, and that she be perpetually enjoined and restrained from making said allegations, representations, and pretensions of marriage with
88 him; that said contract or joint declaration of marriage be decreed and adjudged to be "false, fraudulent, forged, and counterfeited," and ordered to be delivered up, to be cancelled and annulled, according to the practice of courts of equity in like cases; and that he might have such other and further relief as the nature and justice of the case might require.

The complaint was verified in the usual form by his oath. It was filed, as stated above, October 3, 1883, and on the same day a subpœna was issued thereon, which was personally served by the marshal on the defendant at San Francisco two days afterwards—October 5th.

On the 3d of December following the defendant appeared in the suit by solicitors, giving her name as Sarah Althea Sharon, and demurred to the complaint on the alleged ground that it did not contain any matter of equity whereon the court could make any decree or give the complainant any relief against her. The demurrer was argued at the ensuing February term in 1884 and overruled, with leave to the defendant to answer by the next rule day on the usual terms. The case as presented was held to be a proper one for equitable relief. "This supposed contract," said the court, "is alleged to be a forgery and to be fraudulent. It purports to be in writing and to be signed by the parties, and the defendant claims by virtue of it to be the wife of complainant and to have an interest in his property, which is alleged to be of the value of several millions of dollars. There is no adequate remedy at law for complainant against the claim set up under the alleged contract and no means at law to annul it at the suit of complainant. The defendant can choose her own time for enforcing her claim under the alleged contract, even after the death of the other party. Fraud has always been one of the principal heads of equity jurisdiction."

89 "The instrument in question is alleged to be a forgery and a fraud. If it is a forgery it is, of course, a fraud also. The only parties who appear to have any personal knowledge of the facts, so far as indicated—who personally know anything about this transaction—are the two parties to the alleged fraudulent contract. One is alleged to be many years older than the other, the complainant being alleged to be sixty and the defendant twenty-seven years old. The elder, in the ordinary course of nature, is more liable to die, and the contract, in such an event, would be in control of the defendant, without any testimony to defeat the fraud, if fraud there be. The right to several millions of property might be in after years affected and controlled by reason of the alleged fraud. A great wrong and injustice may be thus perpetrated in consequence of it, unless a court of equity can take hold of and cancel it. There is no way by an action at law, that we are aware of, to meet the conditions or effectually

dispose of this instrument." (10 Sawyer, 49, 50.) And again: "If there is no remedy in equity for such a wrong as is charged, then the law is indeed impotent to protect the community against frauds of the most far-reaching and astounding character." (Sharon *vs.* Hill, 10 Sawyer, 48.)

After the case had been commenced in the circuit court of the United States and process served, the defendant, by the name of Sarah Althea Sharon, commenced an action in one of the superior courts of the city and county of San Francisco against the said William Sharon, alleging in her complaint that they had been married by virtue of the said declaration of marriage—that is, the same contract for the cancellation of which, on the alleged ground of its forgery, the suit in the circuit court of the United States had been commenced—and praying that her said marriage might be de-
90 clared legal and valid, and then that she might be divorced from him by reason of certain infidelities to his marriage contract committed by him, which are specially set forth. In that complaint, assuming, without stating, what was generally known in the community, that the defendant was a man of large wealth and had a large income, she alleged that when they intermarried he did not have over five millions of dollars, and that his income did not then exceed the sum of thirty thousand dollars a month, but that since such intermarriage they had "by their prudent management of mines, fortunate speculations, manipulations of the stock market, and other business enterprises, accumulated in money and property more than ten millions of dollars ($10,000,000), so that now the defendant has in his possession or under his control money and property of the value of at least fifteen millions of dollars ($15,000,000), from which he receives an income of over one hundred thousand dollars per month." She, therefore, further prayed that an account might be taken of their business transactions to ascertain their common property, in order that it might be equitably divided between them.

William Sharon filed an answer to that complaint, denying, among other things, that he was ever married to the said Sarah Althea, and averring that the said alleged declaration of marriage between them, purporting to have been signed by him, was a false and forged document, which he had never signed and never heard of until within sixty days then past.

When the defendant in the circuit court, upon the overruling of her demurrer, was called upon to answer, she set up as a plea in abatement to that suit the pendency of the action in the superior court of the city and county of San Francisco, upon the theory that as that action, though subsequently commenced, was founded upon the assumed validity of the alleged marriage contract and involved
91 a determination of that question, and the action, after being removed to the Federal court, had been remanded back to the State court by stipulation of parties, and was then on trial, the circuit court of the United States ought to stay its proceedings in the original suit until the State court had expressed its opinion in refer-

ence to the validity of the contract in question, and then accept its judgment as conclusive.

The plea also set up that the circuit court of the United States had no jurisdiction of the case on the ground that the plaintiff was and had been for more than three years a resident and citizen of California. The plaintiff traversed both pleas and the court held both to be bad—the first, because the two suits were not identical but for different objects, the one proceeding upon an assumed valid contract and asking for a divorce and a division of the community property, and the other seeking a cancellation of the contract for alleged forgery and because the two suits were pending in courts of different jurisdiction. (Stanton *vs.* Embrey, 93 U. S., 548; Gordon *vs.* Gilfoil, 99 *id.*, 169, 178.) The second plea, as to the citizenship of Sharon, was held to be false, no testimony impeaching the allegations of the complaint in that respect having been offered. (10 Sawyer, 394.) These pleas having been overruled, the defendant was allowed thirty days to answer to the merits, and accordingly, on the 30th day of December, 1884, she filed such answer. In the meantime, subsequent to the disposition of the special pleas of the defendant, the superior court of the city and county of San Francisco had decided the case before it, holding the said declaration or contract of marriage to be a genuine and valid instrument, by virtue of which the parties thereto had become husband and wife.

In her answer, therefore, the defendant not only denied the
92 several allegations of the complaint as to the citizenship of the plaintiff, as to the plaintiff's never having been the husband of any other person than Maria Ann Sharon, and as to her being an unmarried woman, and that her "claims were made for any other purpose but that of obtaining the recognition and support justly due" to her as wife of the plaintiff, but set up as a separate defense the action of the superior court of the city and county of San Francisco and its judgment that the said alleged declaration of marriage was a genuine instrument, by which the parties were made husband and wife. A supplemental answer averred that the State court had filed its decree and findings reaffirming its adjudication as to the genuineness of that instrument. One of its findings set forth the alleged marriage contract and added, "which was the only written declaration, contract, or agreement of marriage ever entered into between said parties, and at the time of signing said declaration plaintiff and defendant mutually agreed to take each other as, and henceforth to be to each other, husband and wife."

To these answers replications were filed; whereupon proofs were taken by the parties, which occupied several months. On the 29th day of September, 1885, the cause was submitted on the pleadings and proofs, after elaborate arguments of counsel. Whilst it was pending before the court undecided, and on November 13th, 1885, the plaintiff, William Sharon, died. The decree when rendered was therefore entered as of the day when the cause was submitted, in accordance with the usual practice in such cases. By that decree it was ordered and adjudged that the alleged declaration of marriage was not, nor was any part thereof, signed or executed on said 25th

day of August, A. D. 1880, or at any time by the plaintiff, William Sharon; that it was not his declaration, contract, agreement, or other instrument, but was a false, counterfeited, fabricated, forged, and
93 fraudulent instrument, and as such was null and void; and that the said instrument, within twenty days after notice of the decree to the defendant or to her solicitors, should be delivered by her to and deposited with the clerk of this court, to be endorsed "cancelled," and that upon such delivery the clerk should write across the same "cancelled," by virtue of this decree, and sign his name and affix thereto the seal of this court, and that the document should thereafter remain in the custody of the clerk, subject to the further order of the court. The decree concluded as follows: "And it is further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent, and her and their agents and attorneys be, and they and each and all of them are hereby, perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same in evidence or otherwise to support any right claimed under it, or making any claim or setting up any right, interest, or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant or for any interest in property or rights of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit."

William Sharon left a last will and testament in which he named his son, Frederick W. Sharon, and his son-in-law, Francis G. Newlands, as executors. Newlands declined to act, and to Frederick W. Sharon, as sole executor, letters testamentary were issued. As such executor he, on March 12, 1888, filed one of the bills, the titles of which are given above, to have the suit revived in his favor as such executor so that proceedings may be had for the enforcement of
94 the decree. He alleges that the suit and proceedings under the decree have abated by the death of Sharon; that the alleged marriage contract, adjudged to be a forgery, has not been surrendered for cancellation as ordered by the decree, and he fears that the said defendant will claim and seek to enforce property rights as the wife of William Sharon by virtue of that written declaration of marriage, under the decree of another court (the superior court of the city and county of San Francisco) essentially founded thereon, which, as he is advised, is wholly subject and subordinate to the decree of this court, contrary to the true intent, meaning, and spirit of the perpetual injunction ordered and in violation thereof. He alleges the marriage of the defendant with David S. Terry, who is joined as a defendant with her, and prays the process of the court to the end that the said suit and proceedings therein may stand revived in his favor and be in the same condition and plight in which they were at the time of the abatement.

On the 4th of November, 1885, William Sharon executed a deed of his property, real and personal, to his son-in-law, Francis G. New-

lands, and his son, Frederick W. Sharon, subject to various trusts. Without specifying the details of the said trusts, it may be stated generally that they are designed to secure for some years the protection and management of the property, which is of great value, amounting to several millions of dollars, and its final distribution to the children and grandchildren of the grantor, and to others related by blood or marriage to him. It reserves, however, a power in the grantor to require at any time the trustees to pay over to him "the whole or any part of the net income, rents, issues, and profits of said property" remaining after making certain monthly payments to his children and to his son-in-law for his grandchildren. It also re-
95 serves a power in him to direct a distribution and conveyance of his property at any time during his life to the beneficiaries named instead of at the periods designated therein. It concludes with a solemn asseveration that the said Sarah Althea Hill was not and never had been his wife; that he never proposed marriage to her or married her in any form or manner whatever; that the so-called marriage contract and "dear wife" letters introduced by her in evidence in the State court were forgeries; that all her claims to wifehood were based upon forgeries and perjuries, and he "specially empowers and directs" the trustees "to vigorously contest in every court where a contest can be made" her false claim and pretensions. Frederick W. Sharon has since resigned the duties and powers of said trust, and the execution of the trusts has devolved upon the other trustee named, Francis G. Newlands, and he, as such trustee, and other parties and beneficiaries under the trust deed, on April 14, 1888, filed the other of the bills, the titles of which are given above, which is an original bill in the nature of a bill of revivor and supplement to carry the decree in Sharon *vs.* Hill into execution for their benefit. It sets forth with particularity the proceedings in the suit in the circuit court of the United States and the decree rendered therein and its non-execution and the abatement of the suit by the death of Sharon, and the execution and contents of the trust deed; also the commencement and prosecution by said Sarah Althea of the action in the State court claiming to be his wife under the said declaration of marriage and the proceedings and judgment therein. It avers that the matter in suit in the circuit court exceeded the sum or value of $500; that the property of Sharon was of the value of five millions of dollars over and above his debts and liabilities; that said Sarah Althea Hill claimed all the rights of a wife under the laws of the State of California
96 in the property of the plaintiff and to a reasonable support from him as her husband and to a share in the property acquired by him after the date of said declaration of marriage; that such support was of the value of at least five hundred dollars per month if she was in fact his wife; that she also claimed and asserted a right to one-half of all the property acquired by said William Sharon after the 25th day of August, 1880, and that she is entitled as her share of such property to at least five millions of dollars; that said claim was disputed as false and fraudulent by the said William Sharon, and is now disputed by his successors in interest,

and that it was the object of the suit in this court to protect the property and property rights of said William Sharon and of the complainants, as his successors in interest, against said claims, which were settled by the decree of this court enjoining her from asserting any property rights either as the wife of complainant or under or by virtue of said declaration of marriage.

The bill also sets forth that the State court expressly found and adjudged that the declaration of marriage (which the circuit court has held to be a forgery and annulled) was the only written declaration, contract, or agreement of marriage ever entered into between the parties, and upon such findings and adjudication rendered its judgment, declaring that Sarah Althea was his wife and granting her a divorce from such marriage and awarding her one-half of all the community property accumulated by him after August 25, 1880, and ordering an accounting to ascertain the community property; that the defendant, now Sarah Althea Terry, is threatening and endeavoring for the first time to proceed with an accounting under her judgment of divorce for the purpose of enforcing a division of the property acquired by William Sharon after August 25, 1880,
97 and that she is seeking to discover and inspect the books of account kept by him to the great injury and harassment of the complainants.

The bill also sets forth that the State court made an allowance of alimony by its order, as follows: "It is hereby ordered that the defendant (William Sharon) pay to the plaintiff (Sarah Althea) or her order, on or before the 9th day of March, 1885, the sum of $7,500 as alimony herein, and the further sum of $2,500 on or before the 8th day of April, 1885, and the same amount on or before the 8th day of each and every month hereafter, as alimony, until the further order of this court;" that this judgment was afterward modified, on appeal, by the supreme court of the State on the 31st day of January, 1888, by striking out therefrom the words "the sum of $7,500 as alimony herein, and the further sum of $2,500 on or before the 8th day of April, 1886," and inserting in the stead and place of those words "the sum of $1,500 as alimony herein, and the further sum of $500 on or before the 8th day of April, 1885;" that the said defendant, Sarah Althea Terry, is seeking to enforce that judgment as modified to the injury and harassment of the complainants; that the said judgment of alimony was founded upon and subsists essentially by virtue of the said declaration of marriage, adjudged by this court to be forged and fraudulent and fabricated, and that its execution and enforcement ought in equity to be restrained as an infringement of the decree and prior jurisdiction of this court and of the rights of the complainants thereunder. The complainants therefore pray that the decree in the original suit and the proceedings in enforcement and execution thereof may stand revived and be in the same state, plight, and condition in which the same were at the time of the death of the said William Sharon, and that it may be declared that the complainants, as trustees and beneficiaries as aforesaid, are entitled to revive the said decree and pro-
98 ceedings thereunder for the enforcement thereof, and to have

the full benefit thereof, and to fully enforce and execute the same; and that the decree may be construed and adjudged to forbid and enjoin any and all proceedings in execution or enforcement of the said judgment of the said superior court for alimony and for an accounting and division of the community property; and that said judgments may be declared void and of no effect as against the complainants so far as they authorize any recovery of property or property rights; and that the defendants may be restrained, pending the suits, by an injunction, from taking any further proceedings to enforce or execute the said judgment for alimony or the said judgment for an accounting and division of community property, and from commencing or maintaining any further suit or suits, proceeding or proceedings, of any kind under or upon either of said judgments against the complainants or any of them; and that such injunction upon the hearing may be made perpetual, and that they may have such other or further relief in the premises as may be just.

To these two bills to revive and enforce the decree in the case of Sharon *vs.* Hill the defendants have appeared and demurred. The principal grounds of the demurrer in each case are that the court has no jurisdiction of the subject-matter of the suits or to grant the relief prayed; that the plaintiffs do not show any right or title to maintain their respective suits, and that there is ambiguity and uncertainty in the bills, in that they fail to show what particular property is involved.

99 *Opinion of the Court.*

After filing the above statement of the case Mr. Justice Field delivered the opinion of the court as follows:

As appears by the statement herewith filed, the decree of this court in the case of William Sharon *vs.* Sarah Althea Hill, entered as of the 29th of September, 1885, adjudged the alleged declaration of marriage between the parties, purporting to be executed on the 25th of August, 1880, to be a forgery, and ordered it to be surrendered and cancelled, and enjoined the defendant and all parties claiming under her from making any use of the same as evidence or otherwise to support any claim advanced under it as wife of William Sharon or to any interest in property of any kind against him or his heirs, executors, or successors. William Sharon having died, Frederick W. Sharon, as the executor of his last will and testament, has filed one of the bills before us to revive and carry that decree into execution. Francis G. Newlands, as acting trustee under a deed of trust executed by William Sharon a few days before his death, and certain beneficiaries under that deed have filed the other bill before us, which is an original bill in the nature of a bill of revivor and supplement. It also has for its object to revive the decree in the original suit and enforce its execution for their benefit.

The demurrers are in form to these bills, but the objections raised by them are intended to apply to the original bill in the suit of Sharon *vs.* Hill, and have been argued as though they were in terms

directed against it, the position of counsel being that the circuit court possessed no jurisdiction of the subject-matter of that suit and
100 no power to make the decree entered therein; that the same was absolutely null and void, and therefore that there is nothing to revive. These objections could have been urged when the original bill was pending, and, in fact, were presented so far as they relate to the power of the court to grant the relief prayed. (10 Sawyer, 50.) And the general doctrine is that objections taken to the original bill or which might have been thus taken cannot again be made upon a bill of revivor where the original suit has abated by the death of the plaintiff. The only questions which can then be raised are whether the party in whose name the revival is asked has succeeded to the interests, rights, or claims of the deceased or has become the legal representative of his estate, so as to enable him to continue the prosecution of the suit, if not already determined, or to revive it so as to enforce the judgment rendered, if not already executed. If the suit be pending, undetermined questions previously decided cannot be again raised and reconsidered any more than they could if the plaintiff had not died, and if the suit has gone to final judgment objections which might have controlled it, if presented in time, cannot be afterwards urged against its validity any more than they could by a stranger to the record. An attack upon a judgment in a proceeding to revive it is a collateral attack and can avail only when there is an absolute want of jurisdiction, either of the parties or of the subject-matter. The leading counsel of the defendants accepts this position, although his argument has covered a wider circuit and embraced many matters which could only be considered by us if we were sitting as a court of appeal or upon a rehearing of the case. We reminded him, indeed, that we had no more power in the matter than the court which originally de-
101 cided the case—the court is the same, its members only being different—but we did not limit his argument. We felt the exceeding gravity of the case and the serious consequences to the parties whichever way the controversy may be finally determined. If we are to take the judgment of this court as valid and binding and as importing absolute verity, as the law compels us to do, if the court had jurisdiction of the parties and subject, a case is presented which, from its enormity, may well make society shudder. We, therefore, have listened to and with assiduous care have examined every suggestion of the learned counsel that we might reach, if possible, a just conclusion.

The main point of his argument is that the original suit was brought to cancel a piece of evidence which might assist in establishing a marriage between the parties, but which of itself had no value capable of pecuniary estimation—that no such value is alleged in the pleadings or could be—and therefore the suit is not within the jurisdiction of the circuit court of the United States under the act of Congress of March 3, 1875, in force when the suit was commenced, prescribing and limiting that jurisdiction. That act, as applicable to suits between citizens of different States, is as follows: "The circuit courts of the United States shall have original cogni-

zance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500 * * * in which there shall be a controversy between citizens of different States" (act of March 3, 1875, U. S. Stats., vol. 18, chap. 137). This statute, as counsel very justly claims, requires that there shall be a matter or thing in dispute susceptible of a pecuniary valuation and exceeding the sum or value of five hundred dollars; that the money demand or thing of value must be directly involved in the
102 suit which is tendered for judicial action. We accept the statement as accurately expressing the limits of the jurisdiction of the circuit court under the statute of 1875. A subsequent statute requires the sum or value of the matter in dispute to be $2,000. By matter in dispute, as held by the supreme court, is meant, in an action at law, "the subject of litigation, the matter for which suit is brought and upon which the issue is joined and in relation to which jurors are called and witnesses are examined." If the case be one in equity instead of law, the definition is equally explicit, the words "in relation to which jurors are called" being omitted. The matter at issue in the original suit of Sharon *vs.* Hill was the alleged contract of marriage between the parties, purporting to have been executed on the 25th day of August, 1880, and the object of the suit was to enjoin its use and obtain its cancellation, as a forgery and a fraud. All the testimony was directed to the establishment of the genuineness of that instrument or to prove its forgery. As the fact was found one way or the other, the character of the judgment would be determined; but it is insisted that this contract was not capable of pecuniary estimation; if forged, as claimed on one side, it would be a valueless paper; if genuine, as claimed on the other side, it could of itself establish no property rights in the defendant. What might ultimately result from the marriage which it might aid in proving was only prospective and contingent, lying among mere possibilities. We do not so construe the alleged contract or the rights it conferred upon the alleged wife and the obligations it imposed upon the alleged husband. If genuine and valid, it established a marriage between the parties from its date, assuming, as claimed by her, that it was fol-
103 lowed by the requisite consummation.* It is not a contract to marry at a future day, or an admission that a marriage has already taken place. It is an instrument by which, on the assumption mentioned, the marriage relation was immediately created. It therefore imposed upon him from that date all the obligations of a husband which the law creates, and among which is that of supporting the defendant as his wife in a manner suitable to his condition of life. In her complaint in the State court, which became by her pleadings in the circuit court a part of the records there, she assumes that he was when married worth five mil-

*NOTE BY FIELD, *J.*—By requisite consummation is meant what the law required to render the contract operative as a marriage, such as openly living together as man and wife or, as the statute states, "a mutual assumption of marital rights, duties, or obligations." (Civil Code, sec. 55.)

lions of dollars, for she avers that he was not then worth more than that sum, with an income of thirty thousand dollars a month, and she alleges that since then, by their joint prudent management, he has become worth ten millions more, and his income has increased to one hundred thousand dollars a month. A reasonable allowance for her support which she might claim from him by virtue of that contract of marriage, if genuine and valid, would greatly exceed the amount required for the jurisdiction of the court.

Again, the contract, if genuine and valid, placed her in a position to claim her rights to a portion of the community property—that is, property acquired by the earnings of both since its date. She alleges in the State suit that such earnings amounted to ten millions of dollars; and, if so, under the law as his wife she would be entitled to one-half thereof on his decease against any attempted testamentary disposition. It may be true that he could, notwithstanding the marriage, have disposed of the community property—given it away, perhaps, so as to cut off any claim by her—but the law will not presume that a husband will act so as to defeat any rights which his wife might otherwise justly claim under the law, nor will a remedy
104 of a court of equity be refused because one may place his property where a claim cannot be enforced against it.

Again, the contract, if genuine and valid, gave her an inchoate right of dower in the real property which he then possessed in the District of Columbia, amounting in value to three hundred thousand dollars. That right, though to be enjoyed only in case of her surviving him, had a present substantial value, capable of pecuniary appraisement and of which he could not deprive her by any conveyance of the property without her joining with him. Tables are framed by which the value of such interest is estimated according to the probable duration of the lives of the parties; and compensation for the value of such interest is constantly made in the transfer of real property in States where the right of dower is allowed. (Scribner on Dower, chap. 24, Tables in Appendix.) Such right in the real property of Sharon in the District of Columbia would greatly exceed in value the amount required to give jurisdiction to this court.

We are therefore of opinion that an instrument—such as the declaration of marriage—which, if genuine and followed by the requisite consummation as claimed, would impose upon the plaintiff the obligation to support the defendant, Sarah Althea, in a manner suitable to his condition; that would give her a right to claim one-half of the property in California subsequently acquired by him, alleged to be of the value of $10,000,000, and would give her an inchoate right of dower in real property in the District of Columbia, worth $300,000—may be safely treated as having a pecuniary value exceeding $500—the amount necessary to give the circuit court jurisdiction when the suit was commenced. It is true there is no statement in the pleadings in the original suit of the value of the property of the complainant. It is only alleged that he is possessed of a large fortune in real and personal prop-
105 erty, but that its value amounts to several millions of dollars

does appear in the evidence presented in that case, and that is all that is necessary to maintain the jurisdiction. It is well settled that where the controversy is not respecting the amount or value of the matter in dispute, such amount or value when necessary to the jurisdiction may be shown by the evidence produced in the case or by affidavits filed in behalf of the parties. On this ground the affidavits as to the value of real property owned by William Sharon in the District of Columbia and also of the value of other property owned by him were allowed to be filed during the argument. In *Ex parte* Bradstreet (7 Peters, 634) application was made to the Supreme Court of the United States for a mandamus to compel the district judge of the northern district of New York to reinstate and proceed to try certain writs of right to land which were dismissed by him because it did not appear that they involved the required amount to give the court jurisdiction and to admit such amendments in the pleadings or such evidence as might be necessary to show that amount. In granting the mandamus the Court, by Chief Justice Marshall, said: "In cases where the demand is not for money and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this Court and of the courts of the United States is to allow the value to be given in evidence. In pursuance of this practice the demandant in the suits dismissed by order of the judge of the district court had a right to give the value of the property demanded in evidence at or before the trial of the cause, and would have a right to give it in evidence in this Court." (See also Wilson *vs.* Blair, 119 U. S., 387, and Den *vs.* Wright, Peters Cir. C't, 64, 73.)

106 The practice of admitting such evidence as to the value of the matter in dispute in order to give the Supreme Court of the United States jurisdiction to review the judgments of inferior tribunals where such value does not appear upon the records is followed at every term.

The doctrine for which the learned counsel contends if successfully maintained would strip the Federal courts of the most important branch of their jurisdiction in equity cases. That jurisdiction is remedial and preventive, and, to frustrate fraud and further justice, may be invoked for the reformation, delivery, or enforcement of contracts or other instruments or for their surrender or cancellation. "It is obvious," says Story in his Treatise on Equity Jurisprudence, "that the jurisdiction exercised in cases of this sort is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*—that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him when the evidence to impeach them may be lost, or that they may now throw a cloud or suspicion over his title or interest." (Vol. I, sec. 694.) And, again: "If an instrument ought not to be used or enforced it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose to the injury of a third person; if it is a

deed purporting to convey lands or other hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title; if it is a mere written agreement, solemn or otherwise, still while it exists it is always liable to be applied to improper purposes, and it may be vexatiously litigated at a distance of time when the proper evidence to repel the claim may have been lost or obscured, or when the other party may be disabled
107 from contesting its validity with as much ability and force as he can contest it at the present moment." (*Ibid.*, sec. 700.)

Now, these instruments which may be thus controlled by the court are only evidence of the right of the things to which they relate. They are not the things themselves, and in exercis ng jurisdiction to compel their reformation, delivery, or enforcement or their surrender or cancellation the court is merely acting upon the evidence by which the possession and enjoyment of the things may be advanced or defeated. The value of instruments in the sense by which the jurisdiction of the court is determined is the value of the property the possession or enjoyment of which may be thus affected. Suits to cancel forged contracts, such as a forged deed, are of common occurrence. What is the value of the instrument in controversy in such cases? If it be forged its actual value is nothing; but for purposes of jurisdiction over it by the court it must be held to have, to the rightful owner of the property, the value of the property the possession and enjoyment of which is imperilled by it. That such is the general understanding of the profession we have no doubt, for we can find no case where jurisdiction of the court has been denied in the multitude of instances where it has been invoked, because such instrument is incapable of pecuniary estimation. It is everywhere assumed that the property which could be affected by it if genuine is the measure of its value for the purposes of jurisdiction. We might also refer in support of this view to that branch of equity jurisdiction which is exercised in discovering testimony or perpetuating it. What is the measure of value in such cases? Clearly for purposes of jurisdiction it must be estimated with reference to the value of the property in relation to which it is desired to discover or perpetuate the testimony.

108 A court of equity having jurisdiction to lay its hands upon and control forged and fraudulent instruments, it matters not with what pretensions and claims their validity may be asserted by their possessor, whether they establish a marriage relation with another, or render him an heir to an estate, or confer a title to designated pieces of property, or create a pecuniary obligation. It is enough that, unless set aside or their use restrained, they may impose burdens upon the complaining party or create claims upon his property by which its possession and enjoyment may be destroyed or impaired. It is of no consequence, therefore, that the bill in the original suit of Sharon *vs.* Hill may contain matters appropriate to a suit of jactitation of marriage in a spiritual court of England; it also presents matters of which a court of equity in that country and in this has always had jurisdiction—that is, a case where the possession of a forged document by the defendant is alleged, purporting to

be executed by the plaintiff, which, if genuine, would impose obligations upon him and create claims upon his property.

The learned counsel of the defendants also contends that the bills cannot be maintained on the ground that the plaintiffs show no title of themselves or legal capacity to maintain the suits. As to the bill of revivor by the executor, Frederick W. Sharon, this position is assumed upon the theory that the decree in the original suit is self-executing; that the cause of action in that suit did not survive to the executor; that he only avers that he is the "personal representative" of the deceased plaintiff, without stating that any estate of the deceased has come into his hands. As to the original bill in the nature of a bill of revivor by Newlands and others the further position is assumed that the original suit abated by the transfer by William Sharon of his property to trustees under the deed
109 of trust of November 4, 1885. To these several positions there is a ready and satisfactory answer found in the language of the original decree in the law prescribing the powers and duties of executors and in the terms of the deed of trust. The original decree is not self-execting in all its parts; it may be questioned whether any steps could be taken for its enforcement until it was revived; but if this were otherwise the surrender for cancellation of the alleged marriage contract as ordered requires affirmative action on the part of the defendant. The relief granted is not complete until such surrender is made. When the decree pronounced the instrument a forgery, not only had the plaintiff the right that it should be thus put out of the way of being used in the future, to his harassment and the embarrassment of his estate, but public justice required that it should be formally cancelled, that it might constantly bear on its face the evidence of its bad character whenever and wherever presented or appealed to. In New York and New Haven Railroad Company *vs.* Schuyler (17 N. Y., 592, 599) the court of appeals of New York said: "There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defense at law may become impaired or lost or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. * * * Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon title or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be cancelled."

In Peake *vs.* Highfield (1 Russell, 559), a case which came before Lord Langdale, master of the rolls, in 1826, the bill prayed that an instrument purporting to be a deed of conveyance of real
110 estate by a person since deceased might be delivered up to be cancelled. The report of the case states that there was strong evidence that the deed was forged, though the defendant, who was charged with the commission of forgery, stated in his sworn answer that the deed was executed by the party whose deed it purported to be, and a witness testified that he was present at its execution. The defendant's counsel insisted on three points: "First,

that a court of equity had no jurisdiction on the ground of forgery; secondly, that even if the court had jurisdiction in such a case it would never decree an instrument to be cancelled on the ground of its being a forgery without sending the question to be tried by a jury; thirdly, that, at all events, it was impossible in the present case to order the deed to be cancelled without a trial at law, since there was a witness who swore he saw it executed." The master of the rolls maintained the jurisdiction of the court, although he ordered an issue to try the fact of forgery, and said: "This court has jurisdiction to order a forged instrument to be delivered up and cancelled. In the Bishop of Winchester *vs.* Fournier several cases are mentioned in which forged instruments have been ordered to be delivered up, and they are referred to by Lord Redesdale as unquestioned authorities. In some of them the court made the order at once that the instrument should be delivered up without sending the question to be tried by a jury. In Masters *vs.* Braban, 10 July, 1735, the decree made at the hearing declared a deed to be a forgery. It does not appear that the plaintiffs in the cause prayed that the deed might be declared to have been forged or might be delivered up to be cancelled, yet the court made the declaration and gave the plaintiffs the consequential relief. In Seccombe *vs.* Fitzgerald
the bill was filed to set aside certain notes, and it also im-
111 peached a bond which was alleged to be forged. The decree
with respect to the bond was that it should be delivered up to be cancelled."

In Pierce *vs.* Webb and Stalker, which was before Lord Chancellor Thurlow in 1792 and is reported in a note to 3 Brown's Ch. Cases, pages 16 and 17, the bill prayed that a certain lease of land might be declared fraudulent and delivered up to be cancelled. It was contended on the part of the defendant that no use could be made of the lease at law and that equity could not in such a case compel the delivery of a deed, and, further, that the defendant Stalker, having proved expenses for lasting improvements, was entitled to those allowances; but the lord chancellor decreed for plaintiff with costs and ordered the lease to be delivered up to be cancelled, and did not admit any allowances for improvements, saying that "It has never been doubted that if a man would create a forged deed (of which no use could be made at law), yet equity will interfere and deliver it up."

The doctrine of these cases, as observed by counsel, is in accordance with the statute of this State, which declares that "a written instrument in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable may, upon his application, be so adjudged and ordered to be delivered up or cancelled." (Civil Code, 3412.)

The cause of action set forth in the original suit survived to the executor. Its object was to have set aside and cancelled an instrument which, if genuine and valid, created a claim on the part of the defendant to be supported out of the property of the plaintiff and inchoate rights which on his death would entitle her to a large

share of that property. Had no such suit been brought by William Sharon his executor could have brought one. Indeed, it would be his duty to do so if he believed the instrument a forgery.
112 For the same reasons it is his duty to see that the decree is enforced so far as it may be necessary to protect the property of the deceased against any fraudulent claims or interfere in any way with its disposition as directed by his will, and for that purpose to seek a revival of the decree. Under the law of this State the executor, or administrator when there is no will, is entitled to the possession of all the real and personal property of the deceased until the estate is fully administered or a decree of distribution is made by the probate court. The heirs or devisees of the deceased can only take possession upon such distribution. Until then the executor or administrator represents the heirs and devisees, also the creditors, of the deceased, and in the interest of all of them is bound to use all lawful means, by suit or otherwise, to preserve and protect the estate against all fraudulent claims by which the title or value of the property in his charge may be impaired. This duty devolves upon them from the very nature of their office (Meeks *vs.* Vassault, 3 Sawyer, 213; Cunningham *vs.* Ashley, 45 Cal., 485), and is independent of the specific powers and duties prescribed by statute. In Curtis *vs.* Sutter (15 Cal., 264) a suit by an administrator to quiet the title of an intestate to real property was sustained by the supreme court of the State against the objection that it was improperly brought in his name. If a suit of that nature may be brought it is not perceived, as counsel justly observes, why a suit *quia timet* may not be brought by an executor to cancel a forged paper; and, if so, why he may not file a bill of revivor to obtain the benefit of a decree rendered in favor of the deceased in a suit of that character. We have no doubt that whatever suit the deceased might have brought for the protection of his estate from unreasonable, illegal, and fraudulent claims his executor may bring, and whatever judgments the deceased may have obtained for that protection, which the courts had
113 jurisdiction to render and which have not been fully enforced, his executor may have revived and enforced. The fact that the executor in his bill simply describes himself as the personal representative of the deceased, without averring that any property of the latter had come into his hands, is of no moment. The bill of revivor is to be read in connection with the record in the original suit which declares that the deceased was possessed of a large property, real and personal, and it will be presumed that it came into the hands of his executor, where the law places it, in the absence of averments to the contrary; besides, the only question which can be considered on this bill to revive is whether the plaintiff is executor of the deceased, and thus succeeds by operation of law to the charge of his property, and this fact is admitted by the demurrer. As said by Mr. Justice Story in Slack *vs.* Walcott (3 Mason, 508, 512), "When a party plaintiff dies, whose interest is transmitted to some other person, if the title be that of mere representation in law, there is no change in the title itself, and the only

question that arises is, Who is the person entitled to take as representative—that is, in respect to real estate, who is the heir, and, in respect to personal estate, who is the executor or administrator? When this fact is ascertained the person succeeds by operation of law to the whole title of the deceased. A bill of revivor in such case merely substitutes the representative in lieu of the deceased, and states no new fact as to title, except that of transmission by operation of law. The title of representation or heirship, at least in a court of chancery, is not disputable, but the person in whom it is vested is alone to be ascertained."

The objection that the bill does not describe specifically the property of the deceased is without force. The fact appears
114 in the record of the original suit that the deceased possessed a large and valuable property, the right to portions of which would be affected by the alleged contract, if genuine and valid; but it is earnestly contended, both against the bill of revivor and against the original bill in the nature of a bill of revivor, that the suit in the circuit court abated by the transfer of the decedent's property under the deed of trust of November 4, 1885, and therefore the court could not proceed any further therein. Both of the bills have the same object—to revive the original decree and enforce its execution, the latter being necessary because the trustees and beneficiaries under the trust deed take by a title which may be contested, and not like the executor by operation of law. As said in Slack *vs.* Walcott, "When a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs-at-law. As to these parties the suit is original; it does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far, then, as it states such matter it is an original bill, and so far as it seeks to revive upon that matter it is in the nature of a bill of revivor;" but, as held in the same case, purchasers and devisees by an original bill in the nature of a bill of revivor may draw to themselves the advantages of the former suit, in whatever stage it may be at the time of the abatement.

To the alleged abatement of the original suit by the transfer of the decedent's property there are three answers, each of which is complete. In the first place, the reservations in the trust deed of power in the grantor to claim during his life the payment of the net income, rents, issues, and profits of the property remaining after certain monthly payments to his children and to his son-in-law for his grandchildren continued in him sufficient interest in
115 the property to maintain the suit to cancel a forged document, which might lessen the amount of such income, rents, and profits. In the second place, the decree, having been entered as of September 29, 1885, was, with reference to the trust deed subsequently executed, as though the decree had been announced by the court as of that day. (Mitchell *vs.* Overman, 103 U. S., 62; Borer *vs.* Chapman, 119 U. S., 596–'97.) In the third place, the deed of trust having been made *pendente lite* the trustees and beneficiaries

took subject to the decree which might be subsequently rendered. The suit being to revoke and cancel an instrument which might otherwise lessen the value of the estate, and having been heard and submitted for decision, it is to be presumed, in the absence of any application by the trustees and beneficiaries to be substituted as plaintiffs, that they desired that the case should be held for such determination in their interest. While they might properly have asked to be joined with the plaintiff, they were not bound to do so. The court had jurisdiction to proceed without them to render the decree.

Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of Sharon *vs.* Hill, we proceed to consider how far the judgment therein is affected or should have been affected, if at all, by the judgment in the State court.

William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the Federal court upon the case presented by him; and it would be a strange result if the defendant, who was summoned there, could by any subsequent proceedings elsewhere oust that court of its jurisdiction and rightful authority to decide the case. The Constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different States—a provision which had its origin in the impression that local attachments and prejudices might injuriously
116 affect the administration of justice in the State courts against the claims of citizens of other States. (Railway Company *vs.* Whitton, 13 Wall., 270, 289.) So valuable has the right of citizens of other States than the one in which suits are brought against them to have their cases heard in a Federal court always been regarded that at the very outset of the Government Congress provided, and in different acts since has renewed the provision, that when a citizen of another State is sued in a State court he may, under proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the Federal court, have the case removed to that court and tried or heard there; and all the acts of Congress have declared that it shall be the duty of the State court in such a case to accept the surety and to proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the Federal courts. As said by the Supreme Court in Railroad Co. *vs.* Koontz (104 U. S., 14), it is well settled that "when a sufficient case for removal is made in the State court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored." As Congress has made such careful provision to secure to citizens of other States a right to transfer to a Federal court cases in which they are sued in State courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant properly summoned in the first instance into that court by a citizen of another State could cut off and practically nullify the latter's constitutional right to a hearing

there by instituting a suit in a State court which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be
117 tolerated. The jurisdiction of the Federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.

In Wallace *vs.* McConnell (13 Peters, 143) we have a decision of the Supreme Court of the United States illustrative and confirmatory of this doctrine. That case was brought in the district court of the United States for the district of Alabama, exercising the powers of a circuit court, upon a promissory note of the defendant for $4,880. The defendant pleaded payment and satisfaction, and, issue being joined therein, the case was continued until the succeeding term. The defendant then interposed a plea of *puis darrein* continuance, alleging that as to $4,204 of the sum demanded the plaintiff ought not further to maintain the action against him, because that sum had been attached in proceedings commenced against him under the attachment law of Alabama, in which he was summoned as garnishee. In those proceedings he had admitted his indebtedness beyond a certain payment made, and the State court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case was ultimately taken to the Supreme Court, where it was contended that the proceedings under the attachment law of Alabama were sufficient to bar the action as to the amount of the sum attached, and that therefore the demurrer ought to have been overruled; but the Court said:

"The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdic-
118 tion of the district court of the United States and the right of the plaintiff to prosecute his suit in that court having attached, that right could not be arrested or taken away by any proceedings in another court. This would produce a collision in the jurisdiction of courts that would extremely embarrass the administration of justice."

In Taylor *vs.* Taintor (16 Wallace, 370) the Supreme Court, speaking by Justice Swayne, said:

"Where a State court and a court of the United States may each take jurisdiction the tribunal which first gets it holds it, to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted, and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that where jurisdiction has attached to person or thing it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

In Shoemaker *vs.* French (Chase's Dec., 267) a bill was filed in the circuit court of the United States for the district of Virginia by the

plaintiff Shoemaker for an injunction to prevent the defendant French from acting as president of the Alexandria and Washington Railroad Company, and an order was made directing that he be served with notice of motion for the injunction. After this French filed a bill in a State court of Virginia, praying an injunction against Shoemaker for matters cognate to the bill in the circuit court, and Chief Justice Chase, in granting the prayer of the bill in the circuit court, said:

"The jurisdiction of this court as to these matters attached when Shoemaker's bill was filed here and the order passed by this court. Therefore the jurisdiction of the State court was ousted or must be exercised in subordination to the jurisdiction of this court."

The doctrine that where different courts may entertain juris-
119 diction of the same subject the court which first obtains jurisdiction will retain it to the end of the controversy, either to the entire exclusion of the other or to the exclusion so far as to render the latter's decision subordinate to that of the other, prevails very generally both in the Federal and State courts, with some exceptions which we shall hereafter consider. Thus in Gaylord *vs.* Fort Wayne, Muncie and Cincinnati Railroad Company a bill was filed in the circuit court of the United States for the district of Indiana to obtain, among other things, the appointment of a receiver of the property of an insolvent corporation and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained and an amendment made a receiver was appointed. Whilst proceedings were thus pending in the Federal court, a suit was commenced in a State court of Indiana in which a receiver was also appointed, who took possession of the property. Subsequently the parties thus having possession surrendered the property to the receiver of the Federal court upon his application and the presentation of its order. He was thereupon arrested by the State court, but the Federal court released him and he retained the property, the court refusing to rescind the order appointing him. In disposing of the case the Federal court said: "We think that there is no other safe rule to adopt, in our mixed system of State and Federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled." (6 Biss., 286, 291.)

In Union Mutual Life Insurance Company *vs.* Chicago University a bill was filed in a State court of Illinois to enjoin the foreclosure of a mortgage and have it set aside and declared void. Later on, the same day, a bill was filed in the circuit court of the United States for the northern district of Illinois to foreclose the mortgage.
120 The process of the Federal court was first served, preceding by a few hours the service of process from the State court; and it was held that the fact that process from the Federal court was first served gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage. In deciding the case the court, speaking by Judge Drummond, said: "It is undoubtedly a very embarrassing state of litigation, there being two suits brought in two jurisdictions involving to a great ex-

tent the same subject-matter, and I have felt some difficulty in determining what is the true rule upon this subject, but I have come to the conclusion that it must be this: That this court has a right to go on, as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago—that is to say, which shall prevent that corporation from ever setting up any claim or right to this property or any claim whatever that it had not the right to execute this mortgage." (10 Biss., 191, 195.)

In Mason *vs.* Piggott, in the supreme court of Illinois, it appeared that the defendant, instead of making a defense in an action pending in a court of law, had attempted to transfer the case to a court of equity, and the court said: "It by no means follows because a court of equity has concurrent jurisdiction with a court of law that it will take cognizance of a case already pending in a court of law and oust it of jurisdiction. As a general principle, in all cases of concurrent jurisdiction the tribunal which first obtains jurisdiction of the subject-matter must proceed and finally dispose of it. A court of equity will not take jurisdiction where it has first been acquired by a court of law, unless there is some equitable circumstance in the case which the party cannot avail himself of at law. Subject to this qualification, the rule is inflexible. (11 Ill., 88.)

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In Bank of Bellows Falls *vs.* Rutland R. R. Co., in the supreme court of Vermont, it appeared that the defendant, in an action at law pending against him in Massachusetts, had filed his bill in a Vermont court of chancery to enjoin the action. The bill was dismissed, and the court, admitting the power of a court of equity to enjoin parties within its jurisdiction from proceeding in a court of law in another State, said: "We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party, having the law in his favor, from bringing his case fairly and fully before a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary as matter of policy to prevent a conflict in the action of different courts." (28 Vt., 470–477.)

In Stearns *vs.* Stearns, in the supreme court of Massachusetts, a decree of the probate court appointing commissioners to make partition of an estate among the heirs was reversed because proceedings were first commenced for that purpose in another court of concurrent jurisdiction against the parties moving the decree, which proceedings were pending when the decree was rendered, the court saying that "when different courts have concurrent jurisdiction the one before whom proceedings may be first had, and whose juris-

122 diction first attaches, must necessarily have authority paramount to the other courts; or, rather, the action first commenced shall not be abated by an action commenced between the same parties in relation to the same subject in the same or any other court." (16 Mass., 170.)

The case of Home Insurance Company *vs.* Howell, in the court of chancery of New Jersey, presents some features similar to the case at bar. The complainant filed its bill for relief against two policies of insurance, which it alleged the defendant had fraudulently obtained from it upon his property in Illinois. The bill prayed that the policies might be delivered up and cancelled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or equity upon them or making use of them in any way for the purpose of establishing any claim or damage against the complainant. The defendant appeared and filed an answer, to which, a replication being made, proofs were taken. After the suit was commenced the defendant brought an action at law upon the policies against the company in a State court of Illinois, which suit was, on its petition, removed into the circuit court of the United States for the northern district of Illinois. The company thereupon filed its petition in the court of New Jersey for an injunction to restrain him from prosecuting the suit in Illinois. An injunction having been issued, a motion was made to dissolve it. In denying the motion the chancellor said:

"This court, having the power to hear and determine the subject-matter in controversy and having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is that as between courts of concurrent and co-ordinate jurisdiction (and the circuit court of the United States and the State courts are such in certain controversies, such as that in-

123 volved in this suit, for example, between citizens of different States) the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court." * * * "Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this State or any foreign jurisdiction, and, of course, from prosecuting one commenced after the bringing of the suit in this court." (24 N. J., Eq., 239.)

In Brooks *vs.* Delaplaine the high court of chancery of Maryland dismissed a bill in equity because at the time it was filed a suit involving the same controversy was pending in the county court having concurrent jurisdiction, the chancellor saying: "When two courts have concurrent jurisdiction over the same subject-matter the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres and over the same subjects and persons. * * * Any other rule will

unavoidably lead to perpetual collision and be productive of the most calamitous results." (1 Md. Ch., 354.)

Similar decisions might be cited from the highest courts of nearly every State, for upon the principle stated there is, with certain well-recognized exceptions, a general concurrence of opinion.

Where two judgments relating to the same subject are irreconcilable both cannot be enforced. One or the other must give way, and the only reasonable test by which the superiority of one
124 over the other is to be determined is that which is expressed in the authorities cited, that the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority. If the time of the rendition of the judgment, independently of the commencement of the suit, were to be the test, the superiority of judgment, as counsel well observe, would depend on mere accident or circumstances beyond the power of the court or parties, as one court may have a large calendar and be blocked up with business, creating great delay in the disposition of causes, while the other court may have few causes, and those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter court pre-eminence, because it is enabled from paucity of cases to dispose of its calendar at an earlier day, and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective courts of their preference.

The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: First, where the same plaintiff has asked in the different suits a determination of the same matter; as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudulent and illegal, and therefore vitiating the several obligations, or where the jurisdiction of a court of equity, as well as a court of law, is invoked by him with reference to the matter. Of course, a decision first rendered in either suit may be pleaded in the others; the plaintiff must abide the adjudication which he has sought; and, second, where the cases are upon con-
125 tracts or obligations which, from their nature, are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.

The cases of Duffy *vs.* Lytle, 5 Watts, 120; Rogers *vs.* Odell, 39 N. H., 452; Child *vs.* Powder Works, 45 N. H., 547; Bank of U. S. *vs.* Merchants' Bank, 7 Gill, 415, and Wescott *vs.* Edmunds, 68 Pa. St., 34; fall under one or the other of these classes. The language quoted from Buck *vs.* Colbath (3 Wall., 345) was used as explanatory of the general doctrine that in examining into the exclusive character of the jurisdiction of the court we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. The illustration given of a

party suing in a court of chancery to foreclose his mortgage and in a court of law to recover judgment on his notes and in another court of law in an action of ejectment to recover the possession of the land would have brought the supposed case, if a real one, under the first class of exceptions stated above, where a decree first rendered in either suit upon the same point could have been pleaded as conclusive in the others. In the Tubal Cain case (9 Fed. R., 834) the judgment of the State court pleaded in the United States district court was recovered in the prior action, and the circuit court stayed its proceedings to await the determination of an appeal from the judgment. The other authorities cited do not seem to us, after careful consideration, to be entitled to any weight upon the question presented.

The case at bar is not within either of the excepted classes. The plaintiff has not invoked the jurisdiction of the State court, and the alleged marriage contract is not one which in any sense of the rule was merged or could be merged in the judgment, any
126 more than a deed upon which title to real estate is asserted is merged in a judgment in ejectment for the possession of the property. It was as much an outstanding and existing contract after the judgment of the State court as before, and was equally available for all purposes. But, aside from this, the doctrine of the excepted cases can have no application to cases instituted in a Federal court by a citizen of another State, so as to give paramount authority to a judgment of a State court in a suit subsequently commenced against him, without defeating a most important right conferred upon him by the Constitution and laws of the United States—a result which can in no manner be accomplished either directly or indirectly. (See Suydam *vs.* Broadnax, 14 Peters, 67, and Payne *vs.* Hook, 7 Wall., 430.)

It is true that in the decision of the case Judge Deady expressed his opinion to the effect that as the validity and genuineness of the declaration of marriage were invoked in the State court its determination would be conclusive and estop the plaintiff in this court to show the contrary, if it had not been obviated by the appeal from the judgment. We do not concur with the learned judge in this view, for reasons already stated; but, assuming it to be sound, we agree with him that the effect of the appeal was to prevent the judgment from becoming final and to destroy its efficacy as evidence. By the act of Congress the judgment could only have such faith and credit given to it as it has by law or usage in the courts of the State; and by the law of the State its operation as evidence is superseded by an appeal. The code provides that when an appeal is perfected "it stays all further proceedings in the court below upon the judgment or order appealed from or upon the matters embraced therein," and also that "an action is deemed to be pending from the time of its commencement until its
127 final determination upon appeal or until the time for appeal has passed unless the judgment is sooner satisfied." Such is the express language of the code. (Secs. 946 and 1049.) And, as the district judge observes, these provisions are in conformity with

the law previously existing, according to which an appeal not only stayed the execution of a judgment, but suspended its operation for all purposes. Thus, in Woodbury *vs.* Bowman (13 Cal., 634), which was decided before the adoption of the code, the record of a judgment from which an appeal was pending was offered in evidence and rejected, and the court, in affirming the ruling, said: "We think it was properly rejected. The appeal having suspended the operation of the judgment for all purposes, it was not evidence in the questions at issue, even between the parties to it;" and, in Murray *vs.* Green (64 Cal., 369), decided since the adoption of the code, the record of a judgment in a case then on appeal was offered in evidence and rejected, and the court in sustaining the decision said that while the appeal was pending "the operation of that judgment for all purposes was suspended and it was not admissible in evidence in any controversy between the parties."

The circuit judge did not concur with the district judge as to what would be the effect of the judgment in the State court if it were final, observing that it was unnecessary to determine that question and that he reserved his opinion upon it until it should properly arise for judicial determination and until an opportunity was had for its full discussion and mature consideration, but the circuit judge did concur with the district judge as to the effect of the appeal in destroying the judgment of the State court as evidence of any kind in the Federal court. It was of no avail, therefore,
when pleaded as an estoppel. It was not evidence of the
128 truth of the matters found, much less conclusive evidence.

The ruling of the circuit court in refusing its consideration was therefore correct at the time, and if correct then it could not become erroneous by any subsequent event. The affirmance of the judgment since has no retroactive operation so as to make that ruling bad which was then sound; but, more than this, there is still pending an appeal to the supreme court from an order refusing a new trial in the State court. The judgment therein has not therefore even yet become final; it does not yet establish as between the parties the verity of the findings. In the recent case of Gillmore *vs.* Central Ins. Co., in the supreme court of this State (65. Cal., 65, 66), the effect of a pending motion for a new trial upon the finality of a judgment was considered. There a stipulation had been made that all proceedings should be stayed until final judgment and decision in another action. It was contended that the judgment in that action had become final within the meaning of the stipulation after a year had elapsed from its entry without an appeal being taken from it. There was pending a motion for a new trial and the court said: "Although no appeal had been taken from the judgment within the statutory time, proceedings were pending upon a motion made by the defendant in the case to vacate the judgment and grant a new trial. That motion subjected the judgment to be reviewed and made it liable to be set aside. The judgment was therefore not final in the sense of the stipulation as to the right of the parties affected by it and could not become so until the motion for a new trial had been disposed of. (Hills *vs.* Sherwood, 33 Cal., 474.) While proceedings

are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended, and until litigation on the merits is ended there is no finality to the judgment in the sense of a final de-
129 termination of the rights of the parties, although it has become final for the purpose of an appeal from it." (See also Fulton *vs.* Hanna, 40 Cal., 278.)

It remains to consider the further objections of the defendants that the priority of jurisdiction of the Federal court was waived by the stipulation to remand the case originally commenced in the State court from the Federal court to which it had been removed back to the State court; that the failure to present to the State court the judgment of the Federal court was an abandonment of its protection, and that the execution of the decree in the Federal court by injunction against prosecuting proceedings under the judgment of the State court is forbidden by the act of Congress prohibiting the issue of an injunction to stay proceedings in a State court except in cases of bankruptcy. (R. S., sec. 720.)

The alleged waiver of priority of jurisdiction by the Federal court because of the consent of parties to remand the case commenced in the State court back to it, after its removal, was considered on the argument in the original suit and held to be without force. A statement of the circumstances of the remanding is sufficient answer to the position. The case commenced in the State court by the alleged wife, Sarah Althea, against Sharon, praying that her alleged marriage be declared legal and valid and then that a divorce be decreed, was removed on the application of the defendant therein to the Federal court on the supposition that he had a right to have it heard there. The plaintiff therein denied that right on the ground that the subject-matter, being an action for a divorce, was not within the jurisdiction of the court, and moved to remand it back to the State court. The defendant's counsel appears to have come to the conclusion that her motion would be
130 granted, and instead of waiting for the order of the Federal court to that effect consented that the case might be remanded; and that is all there is of the alleged waiver. The consent waived no rights of priority by the original suit, nor in any respect affected its position. It would be strange if the remanding of one action by consent should change or affect in any degree the jurisdiction of the court over another and different action to which the consent made no reference.

The position that the protection of the decree of the Federal court was waived because the attention of the State court was not called to it, either on the motion for a new trial or on the argument of the appeal in the supreme court, merits careful consideration. There is not and certainly ought not to be anything so unseemly as rivalry and contention between the courts of the State and the courts of the United States. Both have large and responsible duties in the administration of justice for the American people, and we are sure that neither has any desire to encroach upon the jurisdiction and rightful authority of the other; and yet, as both courts have on

many subjects concurrent jurisdiction, it will sometimes happen that there will be a conflict of decision between them, and then a proper respect for each other will induce both to seek a solution consistent with the just rights of the parties. We think therefore it would have been a proper proceeding for the plaintiff in the original suit—the defendant in the State court—to have called the attention of that court and of the supreme court of the State in some formal way to the decision and decree of the Federal court, not for the purpose of changing any alleged rulings had in the State courts, but in order to secure a stay therein of all further proceedings in them. The whole controversy in the State court rested upon the alleged validity of the marriage contract, and this fact is
131 fully set forth in its findings. The decree in the Federal court adjudged that contract to be a forgery and ordered its surrender and cancellation. If this decree be a final one and the court had jurisdiction to render it, there can be no doubt that it should, when presented to the State courts, stay all proceedings therein. Those courts would only be called upon to give full faith and credit to it, not to reverse or review any of their rulings, but to act upon a fact, conclusive of the case, for the first time brought to their attention. They would only be called upon to do what they would do upon official notice to them of any other fact which would conclude a pending controversy. If, for example, there should be brought to a *nisi prius* court after a conviction of an accused party of murder, or before the supreme court of the State on appeal from the judgment, official notice that the convict had been pardoned subsequent to the conviction, the *nisi prius* court would not thereupon grant a new trial or the supreme court reverse the judgment, but both courts might properly be called upon to stay all proceedings upon the conviction, and an order to that effect, reciting the pardon, might be made. So, too, if whilst argument is going on upon the appeal the supposed murdered man should walk into court and present himself, I think the court, though it might find no error in the ruling of the lower court, would readily find a way to stay execution of the judgment upon reciting the personal appearance of the supposed murdered man. So we think the decree of the Federal court might have been officially presented to the State courts and a stay of proceedings in the action there asked; but it was not obligatory upon the defendant in the State courts to present to them the Federal decree. He might think proper to await the final action of those courts, and, if the judgment of the superior court should be ultimately sustained, present the Federal de-
132 cree to stay its enforcement. He might very well have deemed it wise to wait until the time to appeal from the Federal decree had expired before calling upon the State courts to give effect to it in proceedings before them. The time to appeal did not expire until the 15th of January, 1888, after a motion for a new trial had been heard in the lower court and the appeal had been heard and submitted in the supreme court. The decree was entered as of September 29th, 1885, and was as effectual for all purposes as if it had been announced on that day, except where the rights of

others may have been prejudiced thereby; and to prevent such prejudice in shortening the time to appeal it must be deemed to have commenced running only from the date of its actual entry.

There was no effective appeal from the decree in the Federal court taken during the statutory period. There was an attempt by the defendant to appeal and an order was made allowing an appeal, but as this was before the case was revived the order was improvidently made and was without any efficacy. Where a suit has abated by the death of the plaintiff after judgment no appeal can be taken by the defendant until the case is revived. (McClane *vs.* Boon, 6 Wall., 244.)

The decree of the Federal court when revived may be used to stay any attempted enforcement of the judgment of the State court. The case of Boynton *vs.* Ball (121 U. S., 462) is illustrative of this doctrine and has a direct bearing upon the question. There a party who had filed a petition for the benefit of the bankrupt law was sued for a debt in a State court of Illinois. Although he could have applied, under the act of Congress, to the State court for a stay of proceedings until the disposition of his petition in bankruptcy, he made no application of the kind and judgment passed against him
133 there. When he subsequently obtained his discharge in bankruptcy, he presented it to that court and moved for a perpetual stay of execution on its judgment. The motion was denied, and the supreme court of the State affirmed the ruling. The case was then taken on writ of error to the Supreme Court of the United States, where the judgment of the supreme court of Illinois was reversed. After citing the section of the bankrupt act giving the right of the party to stay proceedings in the State courts, the Supreme Court of the United States said: "The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the State court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the State court; in the second place, he may have a defense in the State court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid *pro rata* with his other debts by the assignee in bankruptcy. If for any of these reasons or for others he permits the case to proceed to judgment in the State court by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do, Hill *v.* Harding, 107 U. S., 631, he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the State court; and if, as in the present case,
134 his final discharge is not obtained until after judgment

has been rendered against him in the State court, he may produce that discharge to the State court and obtain the stay of execution which he asks for now."

The failure to present the decree to the State courts did not, therefore, in our opinion, lessen its efficacy and will not prevent it when revived from being hereafter presented to them, and does not impair in any respect the power of this court to enforce its execution.

The prohibition against the issue of an injunction by a court of the United States to stay proceedings in a State court is found in section 5 of the act of March 2, 1793, I Stat., 334, and has been continued in force ever since. It is now contained in section 720 of the Revised Statutes, with an exception relating to proceedings in bankruptcy, and is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Notwithstanding the very general terms of the prohibition, with the single exception mentioned, it has been settled that it does not apply where the Federal court has first obtained jurisdiction or where the State court having first obtained jurisdiction the case has been removed to the Federal court. In such cases the Federal court may restrain all proceedings in a State court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction of the State court has first attached. With its proceedings then no Federal court can interfere by injunction.

In Fisk *vs.* The Union Pacific Railroad Co. (10 Blatchford, 520) the circuit court of the United States for the southern district of New York issued an injunction restraining that corporation
135 from taking any steps in a State court to procure its own dissolution, and the effect of the statute in question was considered. Judge Blatchford, now one of the justices of the Supreme Court, in deciding the case, said: "The provision of section 5 of the act of March 2d, 1793 (1 U.S. Stat. at Large, 334, 335), that a writ of injunction shall not be granted to stay proceedings in any court of a State, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a court of a State before the proceedings are commenced in a Federal court; otherwise, after suit brought in a Federal court, a party defendant could, by resorting to a suit in a State court, defeat in many ways the effective jurisdiction and action of the Federal court after it had obtained full jurisdiction of person and subject-matter. Moreover, the provision of the act of 1793 must be construed in connection with the provision of section 14 of the act of September 24th, 1789 (1 U. S. Stat. at Large, 81, 82), that the Federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. It may properly be considered as necessary for the continued exercise of the jurisdiction of this court over the corporation in question that it should be restrained from taking steps in a State court to put itself out of existence."

In Wagner *vs.* Drake, in the circuit court of the United States for

the district of Iowa (31 Fed. Rep., 851), the question raised was as to the power of the court to restrain proceedings in a State court after the action had been removed to it, and though it was held that the facts of the particular case did not authorize the injunction, the power of the Federal court to restrain such proceedings where irreparable injury would follow a refusal of the writ was fully recognized. In deciding the case the court said: "An injunction
136 in such case by the Federal court restraining the parties before it from proceeding elsewhere is no injunction, within the spirit and intent of the statute, staying proceedings in a State court, because after removal there is no proceeding left in the State court and no jurisdiction to be interfered with. If, after removal, a party could continue or renew his litigation in the State court the whole purpose of the removal might be defeated."

The doctrine of these cases has been affirmed by the Supreme Court of the United States. In French, trustee, *vs.* Hay (22 Wall., 250) that Court held that the circuit court of the United States for the eastern district of Virginia rightfully enjoined proceedings in a suit in a court of Pennsylvania founded upon a decree rendered in a suit in a court of Virginia which had been properly removed to the circuit court. In deciding the case the Supreme Court, speaking by Mr. Justice Swayne, said: "The prohibition in the judiciary act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

In Dietzsch *vs.* Huidekoper (103 U. S., 494) it appeared that an action of replevin had been commenced in a State court of Illinois, which was removed to the circuit court of the United States for that district. Notwithstanding the removal, a writ for the return of the property was issued by the State court, which the plaintiffs in the replevin suit refused to obey. An action was then brought against them and their sureties on the replevin bond. They thereupon filed a bill in the United States circuit court, in which they prayed an injunction to restrain the prosecution of any suit upon the bond. An injunction was issued, and the Supreme Court held that it was properly granted, observing that "a court of the United States
137 is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."

It is essential to the due administration of justice in the Federal courts that they have full power to issue all process necessary for the exercise of their jurisdiction, and such power is in explicit terms conferred by statute upon them. When, therefore, jurisdiction over a subject-matter has first attached in a Federal court it must be able to issue all such orders and process as may be essential to give effect to that jurisdiction. State courts subsequently taking jurisdiction over the same subject must exercise it in subordination to the determination of the Federal court.

We have thus gone over with as much care as we have been able to give the several objections of counsel to the jurisdiction of the

against Sarah Althea Hill, now Sarah Althea Terry, and the proceedings and final decree therein stand revived in the name Frederick W. Sharon, as executor, and against Sarah Althea Terry and
141 David S. Terry, her husband, the said executor being substituted as plaintiff in the place of William Sharon, deceased, and the said David S. Terry being joined as defendant with his wife, so as to give to the said plaintiff executor as aforesaid the full benefit, rights, and protection of said final decree, and full power to enforce the same against the said defendants at all times and in all places and in all particulars. In the second place, that of Francis G. Newland, trustee, and others, beneficiaries under the trust deed, the defendants will have leave to answer untill the next rule day.

Appropriate orders in conformity with this decision will be entered in the respective cases.

September 3d, 1888.

FIELD, *Circuit Justice.*

We concur.

SAWYER, *Circuit Judge.*

SABIN, *District Judge.*

Endorsed: Read in open court September 3d, 1888. L. S. B. Sawyer, clerk.

142 At a stated term, to wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Friday, the 9th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge.

FREDERICK W. SHARON, as Executor of the Last Will of William Sharon, Complainant,
vs.
DAVID S. TERRY and SARAH ALTHEA TERRY, His Wife, Defendants.
} No. 3138.

143 On motion of Geo. R. B. Hayes, Esq., counsel for respondents, an appeal is hereby allowed from the order of revivor in the above-entitled cause, made September 3, 1888, and filed and entered on the seventeenth day of September, A. D. 1888, without any stay of proceeding on the decree or order appealed from, and the amount of the bond, which shall be for costs only, is ordered to be fixed at five hundred dollars.

144 In the Supreme Court of the United States.

FREDERICK W. SHARON, Executor, &c.,
vs.
DAVID S. TERRY and SARAH A. TERRY, His Wife.

Know all men by these presents that we, R. P. Ashe and R. P. Hastings, are held and firmly bound unto Frederick W. Sharon,

executor of the will of William Sharon, deceased, appellee herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Frederick W. Sharon, executor, etc., his successors, assigns, heirs, or administrators or executors; to the payment of which, well and truly to be made, we
145 bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the 19th day of November, A. D. 1888.

Whereas the above-named David S. Terry and Sarah A. Terry, his wife, have been granted and have prosecuted an appeal to the Supreme Court of the United States to reverse an order of revivor in the above-entitled cause September 3, 1888, and filed and entered on the 17th day of September, 1888:

Now, therefore, the condition of this obligation is such that if the above-named David S. Terry and Sarah A. Terry, his wife, appellants, shall prosecute their appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

R. P. ASHE. [SEAL.]
R. P. HASTINGS. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. B. SAWYER.

146 UNITED STATES OF AMERICA, }
Northern District of California, } ss:

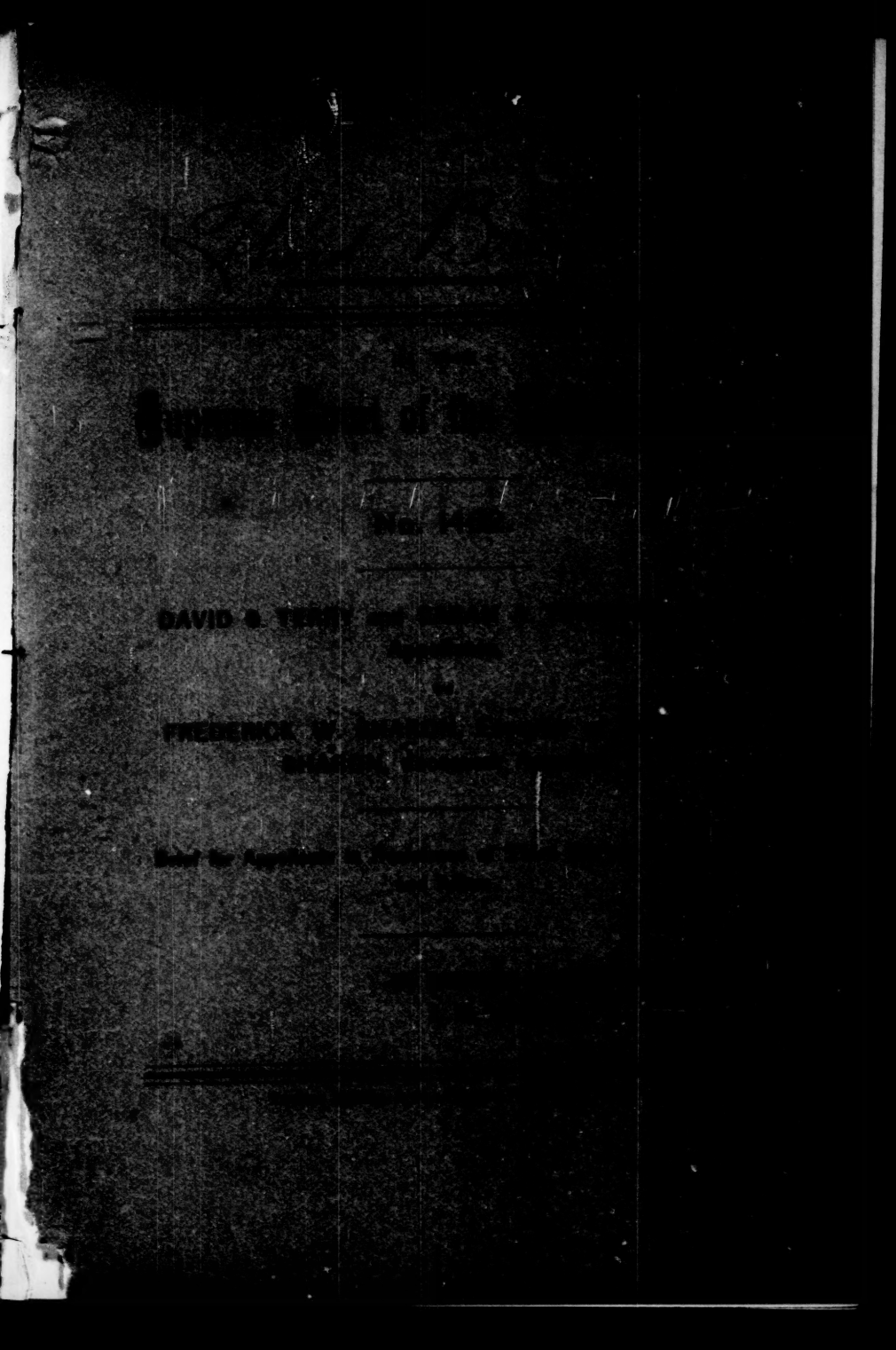
R. P. Ashe and R. P. Hastings, being duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution and over and above all debts and liabilities.

R. P. ASHE.
R. P. HASTINGS.

Subscribed and sworn to before me this 19th day of November, A. D. 1888.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court,
Northern District of California.

(Endorsed:) The form of the within bond and the sufficiency of the sureties thereon are hereby approved. Lorenzo Sawyer, U. S. circuit judge, 9th judicial circuit. Filed Nov. 19, 1888. L. S. B. Sawyer, clerk.



IN THE

Supreme Court of the United States.

DAVID S. TERRY and SARAH A. TERRY, his Wife, Appellants,

vs.

FREDERICK W. SHARON, Executor of WILLIAM SHARON, deceased, Appellee.

No. 1462.

A historical statement touching the present motion is due in explanation of the appearance of three briefs by appellants in the present case:

1. The appellee, Sharon, executor, on the 19th of February, 1889, filed a motion to dismiss the present appeal, and gave notice that he would submit the motion to the court on the 4th day of March, 1889, or as soon thereafter as the court could hear the application. (See printed motion on file.) This motion was to dismiss, and nothing more, and was based upon the sole ground that the decree appealed from was not "final"—and not final because it was in the nature of a mere execution of the final decree of the 15th of January, 1886. (R., 17.)

2. In obedience to the rule of this court and under this notice from appellee, appellant on the 5th day of March, 1889, filed the first brief in resistance of the motion to dismiss.

3. On the day of March, 1889, the said motion to dismiss was by the appellee submitted to the court and was taken under advisement.

4. After such case had been so submitted and taken under advisement, to wit, on or about the 7th day of March, 1889, Mr. H. E. Davis, counsel, newly coming into the case, served notice on counsel for appellants that on the succeeding Monday, March 11th, 1889, appellee would submit a motion to the court to amend said submitted motion to dismiss, by adding thereto a motion to affirm under paragraph 5 of Rule 6.

5. Immediately on receipt of this notice, and assuming that the motion to amend would probably be granted, counsel for ~~appellee~~ appellant prepared and printed a second or supplementary brief in the case in resistance of the said amended motion, and which, along with said first brief filed by appellant, is herewith refiled and adopted and made part of the brief in resistance of the now pending motion to dismiss.

Counsel for appellant had, on said 11th day of March, 1889, this supplemental brief ready to submit to the court in the event that the court should grant said leave to amend.

But on said 11th day of March, instead of submitting said motion to amend, counsel for appellee dismissed their said previously-submitted motion to dismiss, and on the same day served upon counsel for appellant a notice, in printed form, of a new motion to dismiss and affirm, under Rule 6, to be submitted to this court on the 8th day of April, 1889; and along with said notice of said motion, submitted to counsel for appellant a new printed brief in support of the new motion to dismiss and affirm.

An inspection of the said last-named new printed brief will show that it is, down to near the end of page 13 of such new brief, a reprint of the brief by Mr. Samuel M. Wilson, filed on the 19th of February, 1889, in support

of his first motion to dismiss; and that the residue of appellee's last brief is, without expressly acknowledging the fact, devoted, in the main, to answering the first brief filed by appellant.

And it would seem from this fact, namely, that what is new in the last brief is devoted to replying to the first brief of appellant, and from the further fact that the motion to *affirm* cannot be granted by this court if the sole position of the first brief of appellee is well taken, namely, that the decree appealed from is not "final," and from the further consideration that appellee would take the *same* benefit from his first motion to dismiss that can be taken under his succeeding motions, if, indeed, said decree appealed from is not "final"—that these resorts to amended motions and substituted motions and to a new brief have been had in order to get the "last word" in way of reply to appellant's first brief.

We have alluded to this history of these various motions, not for the purpose of making any objection to the fact that they have been resorted to, but simply to explain why appellant has been forced into the position of filing three several briefs in resistance of the motion to dismiss and affirm. The present brief, therefore, *must be taken along with the two preceding ones*, above named; the three making our brief in resistance of the last-filed motion to dismiss and affirm.

Instead of complaining of the changes of motion and the filing of appellee's brief in reply to the first brief of appellant, counsel for appellant feel that their case has, if possible, been strengthened by the filing of the last brief, owing to certain positions taken in it. For example, in appellant's first brief, counsel were at some pains in establishing that the courts of the United States have no jurisdiction, within the States, over divorce or alimony, or over the matters relating to marriage and rights thereunder, which are created and regulated by the police laws

of the States. It will be seen that the last brief by appellee distinctly admits that this is true.

The language of this admission is in these words (page 17):

> "*That whether a given conceded fact or set of facts established a marriage, and whether a marriage should be declared fraudulent and void because of something attending such given fact or set of facts, are questions wholly within the jurisdiction of the State courts, is not doubted.*"

Having premised this much, we now proceed to examine some of the points made in the last brief by appellee in reply to appellant's first brief.

I.

We shall not go over, to any considerable extent, those parts of our briefs which we prepared and printed (as above explained) prior to notice of the present pending motion to dismiss and affirm, in so far as those briefs are devoted to the establishment of the three separate and alternative propositions which are summed up in the recapitulation found on pages 39 and 40 of our first brief.

These three propositions, it will be seen, are, in substance:

First. That the decree of revivor is and can only be an original and final decree because the court was wholly without jurisdiction of the subject-matter embraced in the original decree which the revivor attempts to, but cannot, give vitality to.

Second. That even if this first proposition were not true, and the court had jurisdiction, yet owing to the marriage of the defendant Hill prior to the *actual* rendition of the first decree, and to filing of the bill of revivor, new rights had attached *which compelled resort to a*

"supplemental bill," or "bill in the nature of a bill of revivor," and a decree adjudicating on such a supplemental bill is always "final" in the sense of the statute of appeals; and

Third. That if neither of the preceding propositions were true, and if said bill of revivor and decree thereon were strictly and technically a mere bill and a decree of revivor, yet for the reasons stated in the said third paragraph, beginning at the bottom of page 39 of our first brief, said decree of revivor is a final decree within the statute of appeals, and is within the ruling of this court as found in such cases as—

Davis *v.* Corbin, 112 U. S., 36,

cited in second brief, page 3.

We trust that the court will, however, pardon a suggestion or two in further reply to the first thirteen pages of appellee's last brief, alleging, in substance and effect, that the decree of revivor is only equivalent to an order of the court directing process to issue in the case, and is not such a "final" order or decree as the act authorizing appeals contemplates.

The suggestion we desire to add is rather in the nature of an illustration than an attempt to add anything new, enforcing the propositions found, for example, on pages 30, 31, and 32 of the first brief; and which propositions assert, in substance, that a bill of revivor, and a decree of revivor thereunder, attempting to revive a decree which is shown by the face of the bill of revivor to embrace a subject-matter over which the court rendering the decree had no possible jurisdiction, must be, and of necessity is, an original bill in equity, bad on demurrer; and any decree attempting to revive such a legal nullity must of necessity be reversible on appeal under the doctrine of this court as found in—

Railway Company *v.* Swann, 111 U. S., 305;
United States *v.* Buckabee, 16 Wallace, 414.

And the suggestion and illustration which we now add to those in our prior briefs are also a reply to that part of appellee's last brief where he lays down the proposition "that a bill of revivor puts in issue nothing but the character of the new party brought in."

First, take an additional illustration in reply to everything in appellee's last brief down to the end of page 13.

By section 687 of the Revised Statutes it is enacted that:

"The Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against embassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations."

Now, suppose that a suit is brought in the Circuit Court of the United States for California against one of these embassadors here named, *touching a subject-matter not within the jurisdiction of the Circuit Court and confided to the exclusive jurisdiction of this court;* that such bill shows on its face that neither the said subject-matter nor the defendant is subject to the jurisdiction of the Circuit Court, and that such suit, after decree and judgment, is abated by the death of the plaintiff, before the decree and judgment were satisfied, and that a bill of revivor is filed, by the executor of the deceased plaintiff, to revive the decree and obtain execution thereon and satisfaction thereof.

In filing this bill of revivor it became and is *indispensable* that the bill of revivor should set forth the nature and character of the original bill and decree sought to be revived.

In section 625 of Story's Equity Pleadings, the rule on this point is stated thus:

"Upon the same ground of imperfection of the frame of the bill" (of revivor) "if the material facts to support the revivor are not stated the bill will be demurrable."

In section 626 it is further stated thus:

"A bill of revivor should set forth so much of the original bill as will show that the plaintiff has a right to revive the suit, and that the defendants are the proper parties against whom the revival is to be. Therefore, if it should appear that the plaintiff is not the proper person to revive, or that the defendant is not the proper party against whom it should be revived, because he is not in the chain of representation, a demurrer will lie. And if the statements in the bill of revivor *do not show a title to revive*, the plaintiff cannot on demurrer supply the defect by reading the record of the original bill, although that record be referred to in the bill of revivor."

So in section 831 the same author says:

"If a person, who is entitled to revive a suit, does not proceed in due time, he may be barred by the statute of limitations of actions *which may be pleaded to a bill of revivor afterwards filed.*"

Now, apply to the case just supposed of a bill to revive an abated decree by the Circuit Court of the United States against a foreign embassador who had denied the jurisdiction. Is it not too utterly plain for argument that such a bill of revivor would be demurable, because the decree sought to be revived, as disclosed by the bill of revivor, did show (here quoting the language of Story above cited) that the plaintiff "is not entitled to revive the suit against him?" And it is absolutely self-evident that a decree of this character settles nothing—concludes no rights of the embassador—is absolutely a nullity? Therefore, is it not equally self-evident that the rule of law which, where the court had jurisdiction, prohibits a defendant to a bill of revivor going back of the original decree, and so prohibits him only because such original decree is a conclusive estoppel of record, and has, as such, foreclosed and concluded his rights absolutely, has no possible or conceivable application to such a bill of

revivor, attempting to revive a decree that was rendered without jurisdiction, and is therefore an absolute nullity?

Both of these propositions, just stated as self-evident, touching this supposed case against an embassador, are obviously what we have just stated them to be, namely, so self-evident as to be incapable of enforcement by argument or illustration.

Now, suppose this embassador takes as appeal to this court from such decree of revivor rendered in said supposed case, as he would be entitled to take it under the law of this court, as laid down in Railway *v.* Swann, and The United States *v.* Buckabee, *supra*, and he should be met, in this court, by the proposition which to-day meets us here, to wit, that "all your rights were concluded by the decree of the court below, and all that you were entitled to show in the revivor proceeding below was that stated at the bottom of page 13 of appellee's last brief, namely, that "a bill of revivor puts in issue nothing but the character of the new party brought in," and therefore your rights are all conclusively adjudicated and extinguished by said decree so rendered without jurisdiction.

How would such a spectacle impress the court—the spectacle of a party absolutely concluded and estopped to deny the validity of the original decree rendered by a court without a shadow of jurisdiction over the subject-matter of the decree!

The case of the embassador just supposed, where a bill of revivor in the Circuit Court was filed to revive a decree against him, is, in the respect here involved, the exact case at bar, if it be, indeed, true that said original decree (R., 17) is one attempting to interfere with the State court's exclusive jurisdiction over rights based on marriage. This, therefore, places said original bill in the precise legal category stated on page 32 of our first brief, where an original bill in equity, shown, on its face, to be bad on demurrer because framed to revive, as if it

were a decree, a legal nullity, becomes the foundation of one of those erroneous decrees which may, by this court, be reversed under the law as laid down in Railway *v.* Swann, *supra.*

Here we leave all that part of the appellee's argument which precedes the middle of page 14.

II.

The next point we notice in the opposing brief is that which appears in the last half of said page 14. Counsel there state:

"It is confidently submitted that no case can be produced in which assault on the decree has been permitted on a bill of revivor."

Now, it is a rather odd circumstance that it so happens that the very case which the learned counsel is arguing is a case (if the opinion of the learned justice who delivered the main opinion below (see R., p. 62, fol. 100) is any criterion as to what was held in the case) wherein is expressly asserted the very doctrine which he declares cannot be found in any case in the world.

This case at bar is one in which the learned justice below expressly and distinctly held that, in a revivor suit, an assault is permitted to be made on a decree sought to be revived where the court rendering such original decree was without jurisdiction. And this holding by the court below is noted in our first brief at page 2, by making a quotation from the opinion, below, of Justice Field, found in the record at page 62, where he says:

"An attack upon a judgment in a proceeding to revive is a collateral attack and can avail *only when there is absolute want of jurisdiction either of the parties or subject-matter.*"

Of course we need not say that this statement by Justice Field is equivalent to saying that when there is an absolute want of jurisdiction of either of the parties or the subject-matter, there an "attack" upon a judgment, in a proceeding to revive, is permitted.

We have not explored all the books in the world, nor all the cases, for the purpose of finding whether there is a revivor case to be found in the world where an attack upon the decree sought to be revived was permitted; but we suspect that such cases are very scarce, because we doubt whether it was ever questioned, before it became questioned in the present case, that an attack is always allowed, in every court and everywhere, where such decree is relied on or set up, to be made upon a pretended decree, rendered by a tribunal which was without jurisdiction of the subject-matter.

III.

The opposing brief asserts a most remarkable proposition when it alleges, on page 14, that no case exists in which the question of the validity of a decree was allowed to be raised "between the date of the decree and an attempt to enforce it," and that the only way of getting clear of a decree rendered by a tribunal without jurisdiction over the subject-matter is to reverse it on appeal, or bill of review; and that if the decree were permitted to be attacked otherwise than on appeal or review, it would present the anomaly of an unreversed decree being suspended in the air, &c., that is, left apparently in force but inoperative.

Instead of its being true that no case can be found where a decree rendered without jurisdiction has been allowed to be attacked otherwise than by review or appeal, the truth is that the exact opposite is true, and that a book can scarcely be opened which does not contain

authority of exactly the opposite purport, holding that decrees and judgments rendered in the absence of jurisdiction of the subject-matter can be always, and everywhere, and without exception, attacked collaterally and disregarded.

Or, stating the same thing in the language of this court—

Kilbourn *v.* Thompson, 103 U. S., bottom page 197, top page 198—

"The tendency of modern decisions *everywhere* is to determine that the jurisdiction of a court, or other tribunal, to render a judgment affecting individual rights is *always open to inquiry, when the judgment is relied on in any other proceeding.*"

Here the court cites:

Williamson *v.* Berry, 8 Howard, 498.
Thomas *v.* Whitman, 18 Wallace, 456.
Knowles *v.* Gas-Light and Coke Co., 19 Wallace, 58.
Pennoyer *v.* Neff, 95 U. S., 174.

Or, turn to the cases cited in our first brief, pages 2 and 3, which allege what Freeman on Judgments, in section 20, cited in the first brief, expresses thus:

"The judgment must at least be so far valid as to be impregnable to collateral assault. A void judgment is, in legal effect, *no* judgment. By it *no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. Parties attempting to enforce it may be responsible as trespassers.*"

Some few of the innumerable cases in this court holding precisely what Freeman here asserts, both in regard to judgments at law and decrees in equity and decisions by land tribunals or other executive tribunals, are cited

on page 3 of our first brief; others will be found cited in

Mahn *v.* Harwood, 112 U. S., 358,

and so *ad infinitum.*

In addition to the cases just referred to, we may add the following cases in support of the following proposition:

"If there is a total want of jurisdiction, the proceedings are not merely voidable, but void, and may be rejected when COLLATERALLY drawn in question."

Rose *v.* Himely, 4 Cranch, 241.
Griffith *v.* Frazier, 8 Cranch, 9.
Elliot *v.* Peirsol, 1 Pet., 328.
Thompson *v.* Tolmie, 2 Pet., 157.
Voorhees *v.* Bank of United States, 10 Pet., 449.
Wilcox *v.* M'Connell, 13 Pet., 498.
Shriver *v.* Lynn, 2 How., 43.
Hickey *v.* Stewart, 3 How., 750.
Williamson *v.* Berry, 8 How., 495.
See, also, 10 Wall., 316; 94 U. S., 669; 105 U. S., 428; 128 U. S., 86.

The doctrine of this court upon this subject, bearing upon the allegation of the opposing brief, page, 14, that no cases can be found where judgments are permitted to be attacked otherwise than by appeal or review, cannot be better expressed than it is by Justice Miller in the language above cited, where, speaking of judgments rendered without jurisdiction of the subject-matter, this court says:

"The jurisdiction of a court or other tribunal to render a judgment affecting individual rights is *always* open to inquiry when the judgment is relied on *in any other proceeding.*"

And the same justice states this right of collateral attack always and in any other proceeding where the

judgment without jurisdiction may be set up, in the case of Sherman *v.* Birch, 93 U. S., 216.

A class of cases forcibly illustrative of the proposition, which is the precise *opposite* of that *principal* one of the appellee's brief, (p. 14,) where appellee says no cases exist in which *jurisdiction to render a decree was allowed to be inquired into between the date of the decree and an attempt to enforce it*, is furnished in the cases where officers are held to be trespassers who attempt to enforce a judgment or decree rendered *without jurisdiction of the subject-matter*.

Cases so holding are innumerable. For some see—

Wise *v.* Withers, 3 Cr., 337, by Marshall, C. J.
Dynes *v.* Hoover, 20 Hd., 65.
Conner *v.* Long, 104 U. S., 238, 239, and cases cited.
Shirgold *v.* Holloway, 2 Strong, 1002.
Brown *v.* Compton, 8 Ter. R., 424.
Allen *v.* Greenlee, 2 Dev., 370.
Howard *v.* Clark, 23 Mo. 344.
Batchelder *v.* Currier, 45 N. H., 460.
Fisher *v.* McGirr, 1 Gray, 45.
Stevens *v.* Wilkins, 6 Penn. St., 260.

Here we leave this point in the case, with the demonstration completely made out that the law is precisely the opposite to that stated on page 14 of the brief, if such demonstration can be effected by the innumerable and unvarying decisions of this court extending throughout its entire history.

IV.

We next notice the position taken on pages 16 and 17, which asserts that the original bill (R., 1) in no sense concerned the relation of marriage, its sole object being to adjudge a certain written instrument void and decree

its cancellation; that its object was not to secure an adjudication that the *status* of marriage did not exist, but that said instrument never existed; that the effect of this cancellation of the written instrument upon the marriage relation was wholly a "secondary" feature of the original bill, and that "jurisdiction of United States courts to decree a given instrument false and void is not taken away because of the secondary fact that such instrument, if not false, would constitute or affect the marriage relation;" that the right of such courts to declare the instrument forged is not "affected by the contention on the part of the forger that the instrument, if genuine, gives him rights as to a litigation over which another court has jurisdiction."

This is, in its full strength, the exact substance of the main and vital position of the opposing brief.

Having expressly admitted as "undoubted" (see page 17)—

> "That whether a given fact or set of facts established a marriage, and whether a marriage should be declared fraudulent and void because of something attending such given fact or set of facts, are *questions wholly within the jurisdiction of the State courts*"—

the opposing brief was forced to the position just quoted from pages 16 and 17, that the original bill was not intended to and did not affect, unless remotely and in a "secondary" way, the existence or non-existence of the marriage relation, and that it was no object of the suit to affect that relation.

Now, considering the circumstances under which this position is taken by the opposing brief, it is, we submit, another of those cases in which counsel, of great courage, sometimes startle the spectators.

Let us look for a moment at the bill filed by Sharon *v.* Hill (R., 1), and see whether it was intended to affect this alleged marriage relation.

The bill sets out, in the third paragraph, by alleging that this woman, Hill, through the newspapers, and also privately and otherwise, *claimed to be the wife* of orator, and assumed his name; claimed that she was married to Sharon August 25th, 1880, in San Francisco; that she pretended that, though not married by any justice, &c.; yet that, on said 25th of August, they jointly made a written declaration of marriage, and did the other acts required by section 75 of the Civil Code to constitute marriage, and thereby became man and wife. It then proceeds to say that these pretensions of Hill were false and fraudulent, and were injuring Sharon in his business and credit, and were resorted to in order to enable her to make use of Sharon's name with merchants in procuring credit, and in harassing him, and in injuring his estate, and that of his heirs, and were resorted to for compelling him to pay her "quiet" money; that said Sharon and Hill never were married and never made said writing, and never did the acts required by section 75 of the Code to constitute marriage.

It then sets out the said written contract for marriage, and alleges that it is false and forged, and that all such pretensions of marriage are contrary to equity.

It then concludes by a prayer which, after praying for process and answer, prays as follows:

"And that it be adjudged and *decreed that the said Sarah Althea Hill is not and never was the wife of your orator, and that your orator and the said Althea Hill did not, as is by her alleged and represented, or otherwise, or at all, make said joint declaration of marriage, or any marriage between them, and that the said defendant, Sarah Althea Hill, be perpetually enjoined and restrained from making said allegations, representations, and pretensions of marriage with your orator, and that said false and forged contract be adjudged void, and delivered up to be cancelled.*"

Now, this is the bill which the opposing brief says has no reference, unless remotely and in a "secondary way," to affecting the marriage *status*, and that its *only* object was to destroy a certain instrument of writing, without intending thereby to affect the marriage relation, or the claims of the woman as an alleged wife.

Now, turn to the opinion of the court regarding the question whether a marriage and the rights of the wife, as such, were involved in the present suit. On page 63 of the Record, in the opinion of Justice Field, deciding this case, he states the contention of counsel for Hill, and which contention is quite like that set up in the opposing brief at pages 16 and 17, asserting that the *contract* and not the *existence of the marriage* was the real and only subject-matter of the suit.

There the court says:

"It is insisted that this contract was not capable of pecuniary estimation; if forged, as claimed on one side, it would be a valueless paper; if genuine, as claimed on the other side, it could of itself establish no property rights in the defendant. What might ultimately result from the marriage which it might aid in proving was only prospective and contingent, lying among mere possibilities."

After thus stating the position of Hill's counsel, the Justice proceeds:

"We do not so construe the alleged contract or the rights it conferred upon the alleged wife and the obligations it imposed upon the alleged husband. If genuine and valid it established a marriage between the parties from its date, *assuming, as claimed by her, that it was followed by the requisite consummation.* It is not a contract to marry at a future day, or an admission that a marriage had already taken place. But it was an instrument by which, on the assumption mentioned, the marriage relation was immediately created. It, therefore, imposed upon him from that date all the obligations of a husband

which the law creates, and amongst which is the right of supporting the defendant as his wife in a manner suitable to her condition of life."

Here, then, is the unmistakable holding by the court below that this contract established the marriage relation if coupled with "consummation."

To say, therefore, as the opposing brief does, that the object of this bill was not to annul or affect the marriage relation is, in view of what is, as we have just recited, alleged in the bill, and prayed for in the prayer, and held in the opinion of the court, a proposition simply flying in the face of the express letter of the case about which it talks.

Now, observe that it was touching an instrument which, by its own force, plus that of "consummation" *created*, as the court below says, the marriage relation that this decree ordains as follows:

"The respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent and her and their agents and attorneys, be, and each of them are, hereby perpetually enjoined from alleging the genuiness or the validity of said instrument, and from *making any use of the same in evidence or otherwise to support any right claimed under it, or making any claim or setting up any right, interest, or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or any interest in property or right of any kind or nature against complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit.*"

To say of this original bill and of its prayers and of the opinion of the court just quoted from, and of *this decree*, that they simply abolish said paper, *without affecting the marriage relation or any rights of the wife under that relation*, and that such decree spent its force in simply so destroying such written contract, and left unaffected all

questions of marriage or no marriage, wife or no wife, of alimony or no alimony, is not only to assert what is in the teeth of the express letter of the bill and of the decree thereunder, but is to assert that a court of chancery can *so* cancel a contract—(which affected no subject-matter whatever, conceivable or inconceivable, except the existence of the marriage relation and its resulting rights—which transferred no property—affected no title—constituted, and tended to constitute, no chose in action—created, and pretended to create, no obligation for or against any person whomsoever, cognizable in any court whatsoever)—as that such cancellation would leave all marriage questions and marriage rights unaffected and to be disposed of in the State courts, and yet such decree of cancellation remain and be one within the jurisdiction of chancery courts!

Such a position so holding that chancery could abolish some abstraction found in, or growing out of the said contract, and yet leave the contract in full force for the purpose of the jurisdiction of the State court over marriage, divorce, and alimony—these being the only subjects to which the contract, either nearly or remotely, related—is precisely what this court pronounced to be impossible and absurd in Orton *v.* Smith, 18 Howard, 263.

That was a case where the bill sought to enjoin the use of a certain bond and assignment operating, as was alleged, as a cloud upon the title of the complainant, and where the court below enjoined the parties from ever setting up any claim *by virtue of said bond and assignment;* and in its decree below the court expressly provided that the *prohibition to rely upon said bond and assignment should not operate against the complainant, Orton, in prosecuting a bill pending in the Circuit Court of Milwaukee county, Wisconsin, wherein he was complainant—Knob, defendant—this court not intending to enjoin proceedings in the State court.*

This court, in repudiating said distinction between, on one hand, enjoining the *use of the bond and assignment, and,* on the other hand, enjoining the suit in the State court, said:

"But a decree of a court of chancery, on a bill of peace, *must necessarily operate by way of estoppel as to the title of the land, and conclude all the parties to it, because it should put an end to all litigation between them. If they have suits pending in other courts, on the same question of title, they must cease.* This bill acts by injunction on the party. No injunction ever goes to the court having a concurrent jurisdiction of the question. The courts of the United States have no such power over suits in a State court. *But a decree on a bill of peace, which does not put an end to litigation, is a mere brutum fulmen.* Unless the court can make a decree which it *can execute,* it is a sufficient reason for *refusing to take cognizance of the case.* It is a rule of absolute necessity to be observed by courts who have concurrent jurisdiction, that in all cases 'where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it, have once attached, that that right cannot be arrested or taken away by proceedings in another court.'"

Precisely so is the present attempted distinction sought to be made in the opposing brief (pages 16 and 17) between this decree operating upon marriage, alimony, and the like, and its operating merely upon a piece of paper which, except as it affects marriage, affects no possible or conceivable justiciable right of anybody. If the decree below stops where the opposing brief says it stops, by simply abolishing a paper, and leaving unaffected the marriage relation, and the final decree of the Supreme Court of California establishing the marriage and granting a divorce, then, indeed, is the decree what this court says the decree would be, as contended for in Orton *v.* Smith, mere *brutum fulmen,* and it is, if that view be sound, a *decree about which the appellants care nothing.*

V.

We next turn to the positions stated on pages 18 and 19 of the last brief of appellee. These positions are, in substance, a reply to certain positions of appellant's brief, as found at pages 15, 17, &c., and which positions of appellant, so replied to on said pages 18 and 19, are, in substance, that a decree assuming to abolish a bit of paper and stopping there, and which paper has no conceivable legal effect, except as it tends to prove a marriage, is a species of jurisdiction unknown to equity, because it, without concluding or adjudicating, finally, the question of marriage or no marriage, expends its entire force and stops at the abolition of a non-conclusive item of proof. The substance of the reply made to this is, as found on pages 18 and 19 of appellee's closing brief, one alleging that our position denying that equity will take jurisdiction to abolish an item of proof, is a position which, logically, results in denying *all* jurisdiction in chancery to cancel deeds and other instruments of writing which are admitted to be within the chancery jurisdiction for cancellation; that it is equivalent to such a denial because *all* these instruments, so within the admitted jurisdiction of chancery for cancellation, are, or may be, items or instruments of proof in civil actions.

The answer to this reply, by appellee, is, we think, obvious and complete; and the legal principle of such answer is strongly stated in the opinion of this court by Justice Grier, above quoted, from Orton *v.* Smith. (18 Howard, 265.)

Our position, so replied to by appellee, on pages 18 and 19, we attempt here to restate.

We first state what our position is *not*.

It is not that chancery, in the exercise of its jurisdiction over bills of peace, never puts out of the way an instrument in its nature capable of constituting an item of

proof in a civil action. Nor is our position one that asserts that a decree *quia tamet* may not be, in substance, one which may stop, in a proper case, at the abolition of a deed, or the like, where, from the nature of the case, the cancellation of such deed must *completely remove the threatened mischief to which the bill of peace points, such as a cloud upon title.*

On the contrary, our position is, that chancery, in exercising its jurisdiction over bills of peace, never stops short of determining, adjudicating and perpetually settling—putting an end to—*the threatened mischief* which the instrument or instruments pointed to in the bill and sought to be cancelled, threaten—that is, in this case, the question of marriage or no marriage.

Our position is that bill *quia timet* is never entertained where the full effect of the decree is spent—exhausted—ended—when it simply puts out of the way one or more *non-conclusive* items of proof capable of being used in some threatened or apprehended civil action against the complainant in the bill *quia timet*; and where the decree, *quia timet*, is one which allows such threatened suit, or claim, or mischief, to remain and proceed in the courts as if the decree *quia timet* had not been rendered.

In still another form of statement our position is, that these decrees, on bills of peace, must not only put an end to the false instrument which it assails, but must conclusively estop, prohibit and end the possibility of that particular recovery, or attack, or claim, or mischief which the false instrument tends to establish against the complainant in the bill of peace. Or, applied to the case at bar, equity will not assume to put out of the way a mere marriage contract, which under the law and taken by itself, makes out no actual existing marriage relation, and is but one inconclusive item of proof, tending to establish the marriage, and yet leave the State courts at liberty to proceed to decree the marriage, the divorce, the

alimony, as if no decree *quia timet* had been rendered; that it is impossible for equity to make a decree in this case to abolish this marriage contract, without such decree, therein and thereby, and, *ex propria vigore*, also abolishing the rights of Mrs. Sharon in her marriage, and including her right to assert anywhere, or in any way the legal existence of the marriage, or without prohibiting her from asserting or having any rights springing out of that relation.

The only alleged and only conceivable vexation, harrassment, mischief, or claim which the present bill asserts, points to and seeks to escape from, is *the marriage and its legal consequences.* A decree in equity which under *such* a bill *only* cancels the written contract of marriage, but leaves the marriage relation unassailed and at liberty to be asserted in the State courts, is one which we say is, in its kind, unknown to this head of chancery jurisdiction.

And it is precisely this, as we have seen, which is unanimously ruled by this court in Orton *v.* Smith, *supra*, where the court says:

"But a decree on a bill of peace which *does not put an end to litigation is mere brutum fulmen.* Unless the court can make a decree which it can execute, it is a sufficient reason for refusing to take cognizance of the case. It is a rule of absolute necessity to be observed by courts who have concurrent jurisdiction, that in all cases 'where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that that right cannot be arrested or taken away by proceedings in another court.'"

To make this decree *quia timet* exhaust its force in the mere overthrow of the assailed paper, and to allow the case which it tends to prove to go on, is in its legal quality like enjoining a witness from swearing to his knowledge of the great value of an estate in a case where

the sale of the land is sought to be set aside for false representations by the vendee regarding the value thereof; or it is like enjoining, in this case, Mrs. Sharon from proving that cohabitation which the law makes to be the "consummation" of her marriage with Sharon; or, it is like a decree in chancery cancelling some witness's knowledge of Sharon's having introduced Mrs. Sharon *as his wife;* and yet, after, and notwithstanding, such injunctions, allowing all these cases wherein such evidence was enjoined to proceed to trial in the State courts as if nothing in the way of injunctions had occurred.

This is the exact effect of the positions of the opposing brief, which say that the original bill and decree left unaffected the question of marriage or no marriage, divorce or no divorce, alimony or no alimony, and allowed these questions to proceed to trial in the State courts unaffected by the said injunctions.

Now, it is, as already remarked, precisely such a bill and decree as the opposing brief says the case at bar was and is, to wit, one expending its force on the said contract, but leaving that one thing and case, namely, the marriage and divorce which alone said contract tends to prove or affect, unaffected by the decree enjoining the said paper, which this court in Orton *v.* Smith pronounces a legal monstrosity—*brutum fulmen.*

If said decree is, indeed, one stopping at the abolishment of said contract, and not touching the marriage, as appellee's brief says it is, then it is no decree; it is a mere pronunciamento; a bull against the comet; a judgment uttered in the air—mere *brutum fulmen.*

Such an inconsequential decree is far less judicial in its nature, far less one in an action of a civil nature, than was the mandamus commented on by Sawyer, J., in Rosenbaum's case cited, p. 15, first brief.

Such decree is one rendering no judgment. It is a decree which, of itself, affords no remedy. It establishes no rights, and is, therefore, not a suit "of a civil nature at common law or in equity" within the sense of these words in section 629 of the Revised Statutes.

If, on the other hand, the decree is one which *does* assume to control the question of the existence and dissolution of the marriage relation, and of the rights arising therefrom, then it is a decree which the Circuit Court had no semblance of power to render, and *this* is admitted on page 17 of the appellee's closing brief, as we have above quoted.

The present brief is not designed to take the place of the two preceding ones prepared, printed, and filed as we have above explained. This brief is designed mainly to notice the principal points of appellee's closing brief. All three are submitted to the court as appellant's brief in the case.

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IN THE

Supreme Court of the United States.

DAVID S. TERRY and SARAH A. TERRY, his wife, Appellants,
vs.
FREDERICK W. SHARON, Executor of WILLIAM SHARON, deceased, Appellee.
No. 1462.

Brief for Appellants.

Since the present motion to dismiss for the want of jurisdiction, for the alleged cause that the decree of revivor is not final or appealable, is one in the discussion of which counsel are precluded, by the practice of this court, from discussing the general merits, therefore this brief cannot and will not allude to the many questions affecting the merits which were discussed below very elaborately by able counsel.

The facts which control the disposition of the present motion to dismiss are, in the main, condensedly set forth in the opposing brief (pages 1 to 6), and, therefore, need not be here repeated. Any facts which we may find it necessary to add will be stated as we go along.

We first consider the radical and underlying question whether the bill of revivor filed in this case (R., 21) and the decree of revivor of September 17th, 1888, (R., 28,) and from which the present appeal is allowed and taken (R., 86), relate to a subject-matter over which the Circuit

Court had jurisdiction. We will afterwards come to the question whether the decree of revivor in this case is "final" in such sense as that this court may review it.

I. Original Decree of Revivor Void.

Our first point in support of the proposition that the court was without jurisdiction to enter the order of revivor appealed from, we state thus:

If the Circuit Court was without jurisdiction to render the original decree on the 15th of January, 1886, (R., 17,) then the court was without jurisdiction to render the decree of revivor of September 17th, 1888.

In the opinion by the presiding justice who rendered the decree of revivor it will be seen that he expressly admits and declares that, if the court was without jurisdiction of the subject-matter or the parties, in rendering the original decree of injunction in Sharon against Hill, then it was equally without jurisdiction to render the decree of revivor. The language of the justice on this point is (R., 62):

"An attack upon a judgment in a proceeding to revive is a collateral attack, and can avail *only* when there is an absolute want of jurisdiction either of the parties or of the subject-matter."

This position, which renders the decree of revivor void if the original decree was one rendered without jurisdiction, is one which arises absolutely and without any exception out of those maxims of the law which assert that "a judgment of a court without jurisdiction is an *absolute nullity*, and is void even if both parties desired to have the jurisdiction exerted."

R. R. Co. *v.* Swann, 111 U. S., 379.

It is equally a maxim applicable to this point that any process, whether execution, attachment, order of revivor,

or other proceeding, which is based on a judgment rendered without jurisdiction of the subject-matter, is in the same legal plight with a process issued without any judgment at all. The two are alike because the judgment without jurisdiction is simply and absolutely void.

Freeman on Executions, edition 1885, note 2, sec. 16; *ib.*, sec. 20.

In this last-cited section 20, the learned author says, speaking of the validity of an execution issued upon judgments:

"It" (the judgment) "must at least be so far valid as to be impregnable to *collateral* assault. A void judgment is in legal effect *no* judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, *all proceedings founded upon it are equally worthless.* It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. Parties attempting to enforce it may be responsible as trespassers," citing

Alby *v.* Ward, 8 Mass., 79.
Gelston *v.* Thompson, 29 Md., 595.
Morris *v.* Hough, 37 Ill., 150.
Johnson *v.* Baker, 38 Ill., 98.
Chace *v.* Dana, 44 Ill., 262.
Godfrey *v.* Terry, 97 U. S., 171.

That if there is a total want of jurisdiction of the subject-matter the proceedings are not merely voidable, but wholly and absolutely void, and may be rejected when collaterally drawn in question, is decided in the cases following:

In re Sawyer, 124 U. S. R., 220.
Elliott *v.* Pierzol, 1 Peters, 328, 340.
Wilcox *v.* Jackson, 13 Peters, 498, 511.
Hickey *v.* Stewart, 3 Howard, 750–762.
Thompson *v.* Whitman, 18 Wall., 467.

These very familiar and very important maxims of the law just quoted from Freeman are well stated in Cooley's Constitutional Limitations, side page 398, thus:

"The law creates courts, and, upon considerations of general public policy, defines and limits their jurisdiction; and this can neither be enlarged nor restricted by the acts of the parties.

"Accordingly, where a court by law has no jurisdiction of the *subject-matter* of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings, and refuse to be bound by them, notwithstanding he may once have consented to its action either by voluntarily commencing the proceedings as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action. This right he may avail himself of at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all."

Again:

"There are no presumptions in favor of the jurisdiction of the Federal courts, as they are specially constituted with jurisdiction in certain cases; and the facts upon which it rests must appear in some form in the record of all suits prosecuted before them. They have no jurisdiction except such as the statute confers."

Sheldon *v.* Sill, 8 Howard, 141.
United States *v.* Eckfort, 6 Wallace, 484.
Cary *v.* Curtis, 3 Howard, 236.
Wisconsin *v.* Duluth, 2 Dillon, 206.
Hubbard *v.* R. R., 3 Blackford, 84.
Dred Scott *v.* Sanford, 19 Howard, 393.
Cases of Sewing Machine Co's., 18 Wallace, 577, and cases there cited.

We trust that the apology due from counsel for here repeating the foregoing propositions touching jurisdic-

tion which are so purely elementary and so familiar will be found in the fact that these principles, if applied in this case, must reverse the judgment below, and, of course, defeat this motion to dismiss.

II.

Existence, Continuance, and Dissolution of Marriage Relation Not Subjects of Federal Jurisdicton.

Our next and the main proposition we state thus:

The relief prayed in Sharon's original bill (R., 4, fol. 6), asking that it be decreed against the defendant, Hill, that she "is not and never was the wife of your orator," being a matter having its foundations wholly in alleged conjugal relations created and existing under the laws of the State of California, is a subject-matter not within the provisions of the statute of March 3d, 1875, defining the jurisdiction of the Circuit Courts, which enacts that (R.S., sec. 629):

"The Circuit Courts shall have original jurisdiction as follows: First, of all suits of a *civil nature* at common law or in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State," &c.

This proposition of ours, stated in another way, is, that under the operation and control of this section 629 all proceedings for divorce, or looking to an interruption of the marital relations, or directed to the determination of the existence or non-existence of these relations between parties having controversy in that regard, or looking to the adjudication of rights, such as alimony, arising *directly* out of the marriage relation, are controversies not within the signification of the words "suits of a civil nature at

common law or in equity," as employed in this section 629, and are, when within a State, subjects-matter not within the jurisdiction of the Circuit Court.

We may repeat our present proposition still more broadly than as it is just stated; and we will support such proposition, in all its forms, by authority which, we submit, is quite impregnable.

Our proposition stated thus more broadly is that—

Since marriage is a "domestic" and not a mere contract relation, and since the matter of regulating the contracting of the marriage relation, fixing and defining the duties thereof, and the conditions and means under and by which the same may be dissolved, are matters belonging to the police powers of the respective States, no part of which police powers has been "delegated" to the General Government, and is wholly reserved to the States; therefore Congress has not assumed to confer upon the courts of the United States any control within the limits of any State, over the formation, continuance, duties, or dissolution of this domestic relation.

To the establishment of these propositions in each of their forms now stated we turn.

1st. Bishop on Divorce, section 87, page 68, is in the following words:

"The *national power has no jurisdiction of marriage and divorce within the local limits of the States.* Therefore, all laws on the subject, whether statutory or common, are, within these limits, State laws."

To this the author cites—

Barber *v.* Barber, 21 Howard, 582.
Fraser *v.* State, 3 Texas Appeal, 263–275.
Ex rel. Hobbs, 1 Woods, 537.
Green *v.* The State, 58 Ala., 190.
State *v.* Gibson, 36 Indiana, 386.
Lonas *v.* The State, 3 Heisk. (Tenn.), 287.

This case of Barber *v.* Barber (21 Howard, 582) was one wherein a wife, by her next friend, a citizen of New York, brought a suit against her husband, a citizen of Wisconsin, for the purpose of giving validity, in Wisconsin, to a judgment recovered by her in the state courts of New York against her husband for alimony; such wife having been divorced *a mensa et thoro*, with an allowance of alimony, in a case where the New York court, in granting the decree of divorce and alimony, had jurisdiction of the parties and of the subject-matter. The points determined by this court in that case which are material in their application to the present motion to dismiss, are embodied in the head-notes in these words:

"1. This court disclaims *altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to a divorce a vinculo, or to one from bed and board.*

"But where a court of competent jurisdiction in New York decreed a divorce *a mensa et thoro* between man and wife, allowing alimony to the latter, and the husband removed to Wisconsin for the purpose of placing himself beyond the jurisdiction of the court, which could enforce it, without having paid any part of the alimony, or leaving any estate of any kind out of which it could be paid, the wife can sue, by her next friend, in a court of the United States having equity jurisdiction, to recover the amount of alimony decreed by the State court.',

The court further decides that a divorce in favor of the husband in Wisconsin, *a vinculo*, on the ground of willful desertion by the wife does not relieve the husband from the New York decree for alimony. The court also finds that, in this country and England, chancery will interfere to compel payment of alimony *decreed by competent jurisdiction to a wife;* and that—

—"The parties to a case for divorce, and for alimony, are as much bound by a decree for both, which has been

given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given by the Ecclesiastical courts of England."

The court also held that after the divorce *a mensa et thoro*, in New York, the domicil of the wife did not follow that of the husband to Wisconsin; and that a wife divorced, *a mensa et thoro*, is entitled to acquire a domicil for herself distinct from that of her husband; and she may, by her next friend, sue her husband for alimony, which he had been decreed, under a supplemental bill, to pay as an incident of such a decree; and that of such suit in Wisconsin by the wife, through her next friend, against her husband, the District Court in Wisconsin had jurisdiction.

In the body of the opinion, by Justice Wayne, in this case, the following language is used:

"We shall not have occasion to comment upon the relations of husband and wife in her uninterrupted coverture, nor will we discuss the general rights, obligations, or disabilities, of either, when they have been separated by a divorce *a mensa et thoro*.

"Our first remark is—AND WE WISH IT TO BE REMEMBERED—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as an incident of a divorce *a vinculo*, or to one from bed and board."

This case is recognized and reaffirmed in Johnson *v.* Johnson, (13 Fed. Rep., 193.)

In the case of Hoobs, cited *supra*, (1 Wood's Circuit Court R., 537,) what is decided the head-note states as follows:

"The marriage relation between white persons and persons of African descent is prohibited and declared null and void by the laws of Georgia; *Held*, That marriage laws are under the control of the States, and that the law made is not annulled or affected by the Civil Rights bill of Congress, or the Fourteenth Amendment to the Constitution of the United States."

125 U. S. 210 et seq.

The case of Doc. Lonas against the State, in 3 Heiskell, (Tenn.,) 287, is one which decided that:

"The act of 1870, c. 39, making it a felony for white persons and negroes to marry, or cohabit together as man and wife, is a valid act not affected by the Constitution of the United States, the Civil Rights Bill, or Enforcement Law."

In this case the court, amongst other things, considers, in the light of the authorities, whether marriage is a condition accomplished by or based upon a civil contract merely; whether the relationship is a matter of civil right as distinguished from a domestic state; and the court reaches the conclusion that marriage is one of the domestic relations, and is not within the language of the Fourteenth Amendment protective of civil rights; and that this domestic relation is wholly under the control of the States. The court says (pp. 308–309):

"It" (marriage) "derives both its rights and its duties from a source higher than any contract of which the parties are capable, and as to this it is uncontrollable by any contract they can make, although it may be formed by a contract, yet when formed it has none of the attributes of a contract but becomes a domestic relation. And it is no more a contract than a fatherhood or sonship of serfdom, or slavery, or apprenticeships, are contracts."

Then, quoting from Chief Justice Robinson, the author proceeds:

"Thus, marriage, though in one sense a contract, because being both stipulatory and consensual, it cannot be

valid without the spontaneous concurrence of two competent minds, is, nevertheless, *sui generis*, and unlike ordinary or commercial contracts is *publici juris*, because it establishes fundamental and most important domestic relations. And, therefore, as every well organized society is essentially interested in the harmony and decorum of all its social relations, marriage, the most elementary and useful of all, is regulated and controlled by the sovereign power of the State. McGuire *v.* McGuire, 7 Dana, 187."

The same thing is decided in Green *v.* The State, 58 Alabama, 190.

In the case of The State, *ex rel.* O'Brien *v.* Dillon, 36 Ind., 388, the same thing is decided as in the preceding cases from the State decisions. And in this opinion the court proceeds to an elaborate examination of the question whether, by the Constitution, Congress can assume any jurisdiction over the domestic relation of marriage, or can bestow any power upon the courts regarding that matter.

In reaching the conclusion that neither the Fourteenth Amendment, nor any other provision of the Constitution surrenders to the General Government any part of the reserved police powers of the State to provide for the welfare of the people by exclusive power over, amongst other things, the domestic relation of marriage, the court cites from—

Prigg *v.* Pennsylvania, 16 Peters, 625.
City of New York *v.* Miln, 11 Peters, 139.
R. R. Co. *v.* Miles, 2 American Law Rev., 358.
And many other cases.

The general purport of these cases is adequately expressed from the following in the language of this court in New York City *v.* Miln, *supra*, where this court, speaking of the reserved police powers of the States, says:

"And by virtue of this, it is not only the right, but the bounded and solemn duty of a State to advance the safety,

happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; and where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all these powers which relate to merely municipal legislation, or what may perhaps more properly be called internal police, are not thus surrendered or restrained; and that *consequently, in relation to this authority of a State, is complete, unqualified, and* EXCLUSIVE."

The case of Fraser *v.* The State, decided in 1877 by the Court of Appeals of Texas, (3 Texas Appeals, 263,) decides the same as the preceding cases cited from the States, with this also accurately stated in the second paragraph of the head-note:

"Power has not been conferred upon Congress to regulate or control the institution of marriage within the several States. Marriage is not a privilege or immunity within the meaning of the Fourteenth Amendment; nor is it a contract within the meaning of the civil-rights bill, but is a civil status, the rights, obligations, and duties of which are not conventional between the parties who entered into it, but are prescribed and regulated by State legislation, over which they have no control."

At page 273 the court comes to a review of the authorities upon the question whether the possession of this police power, regulative of the creation, conditions, and duties of the marriage relation, has in any degree been surrendered to the United States or limited as against the States; and on a most elaborate review of the authorities reaches the conclusion stated in the above-cited second paragraph of the syllabus.

It would, we submit, be quite useless for us to pursue this important part of the case further, because it is absolutely settled that neither the Congress of the United States nor the courts of the United States received

under the Constitution any power to interfere with (to here quote the words of this court, Barber *v.* Barber, *supra*, page 184) the relations of husband and wife in her coverture, "nor with the general rights, obligations, or disabilities of either, even when they have been separated *a mensa et thoro*;" and that this court—

> "*Disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board.*"

The court will please keep carefully in mind what the proposition of law is to which we have cited the foregoing authorities, and which we now distinctly press upon the attention of the court.

This present proposition is not whether the United States courts as a general rule possess the chancery jurisdiction to cancel contracts, or deeds, or other obligations, relating to or affecting common-law property rights.

So far as that question is here involved we shall come to it presently and separately. What we now consider, and have cited authorities to support, is the question whether the United States courts can receive, or have received, from Congress any jurisdiction over that other and different class of subjects-matter, to wit, over the formation, the existence, the duties, the obligations, or the continuance of the marriage relation, or over the right or the power of parties alleging themselves to be entitled to the privileges of this domestic relation, to assert or to otherwise have or enjoy the privileges of that relation.

Stated in other words, the question we now consider is whether the courts of the United States possess jurisdiction over the question whether Sarah Althea Hill was or was not the wife of William Sharon, as prayed in the bill of Sharon against Hill (R., 4), or possessed any jurisdic-

tion under which such courts could adjudicate, affect, determine, or control the matter, either of the existence of, or the methods of enjoying, the rights of the so-called Sarah Althea Hill, as springing out of the said marriage relation, if it did in fact exist.

This distinct proposition of the absolute absence of all authority in the courts in the United States either to pass upon the existence of the marriage relation, or, as courts of first instance and of original jurisdiction, to measure, limit, define, or control the rights of parties springing out of the marriage relation, as these rights are established and regulated by the police laws of the several States, is not only established by the authorities which we have gone over, but was, in effect, admitted by the Circuit Court below.

No Power Over Marriage, in Effect, Admitted in Circuit Court.

It will be observed by the court here, that, whilst the bill of the complainant, William Sharon, prayed that the court should decree that "Sarah Althea Hill is not and never was the wife of your orator," and prayed that she be perpetually enjoined and restrained from making allegations, representations, and pretensions of marriage with Sharon, yet the decree rendered in that case (R., 17) wholly abstains from granting any such relief, and confines itself to declaring that the written delaration of marriage, dated 25th of August, 1880, was not genuine, but forged; that it be cancelled; that within twenty days from the date of the decree such written declaration of marriage be delivered to the clerk, to be endorsed "cancelled;" to remain in the custody of the clerk; and that Sarah Althea Hill, her heirs, assigns, executors and administrators, and all persons claiming any interest thereunder, by or through said respondent, and her heirs,

agents, and attorneys be perpetually enjoined from alleging the genuineness of said instrument, or making any claim thereunder.

It is thus seen that the court below refused to entertain, *directly and avowedly*, any jurisdiction over the matter of Mrs. Hill's asserting that she was Sharon's wife, or over any other matter than simply that said instrument of writing should be destroyed, and never relied on for any purpose or anywhere.

We allude to this point of the absence in the decree of an attempt avowedly and in terms to decide upon the marital relations of Mrs. Hill's rights thereunder, only for the purpose of availing ourselves of the authority of the Circuit Court, in this case, that it had no jurisdiction over that matter, and hence the absence, in the decree, of all attempts, *directly and avowedly*, (although it attempted to do so in legal effect,) to exercise jurisdiction over rights springing from such relation.

As additional authority in support of the proposition asserting the total absence of jurisdiction in the Federal Courts over the continuance, existence, dissolution, or enjoyment of the marriage relation, we call the court's attention to the fact that there is not, so far as we can find, a case in the history of the judiciary of the United States where courts of the United States have, within a State, exercised any jurisdiction over these matters of divorce, alimony, or other rights springing *directly* out of the mere *existence* of the marriage relations.

NOT A SUIT OF A CIVIL NATURE WITHIN SECTION 629.

Again observe: This bill of Sharon against Hill is not one directed to the cancellation of any instrument which conveys or which directly affects any property rights cognizable either at law or equity; that such equity case is not one seeking, either directly or otherwise, any de-

cree for any property, or securing any interest therein or title thereto, or demanding any right cognizable in any court of law or equity—unless the right to destroy said instrument be one within the jurisdiction of United States courts of equity; that, on the contrary, the real substance and effect of such pretended equity suit is nothing more than one seeking to put out of the way, *and prohibit from being used in State courts or otherwise*, a mere item of proof, bearing upon the existence of an alleged marriage relation, such proof being made competent under the laws of California for said purpose; that said item of proof, to wit, the written marriage contract, is not one which, in any way, nearly or remotely, affects any property right of the plaintiff, unless it remotely affects property rights through its tendency to prove complainant's marriage.

These things being carefully observed, and being palpably undeniable, it results from them:

1. That said written contract of marriage is not such an instrument as courts of chancery ever have undertaken to cancel; and to so undertake is no less absurd than for the court to undertake to abolish the *knowledge and recollection of such marriage possessed by living witnesses;* and

2. That this being the character of the said suit in equity, it is clearly not "a suit of a civil nature at law or in equity" within the sense of these words defining the jurisdiction of the Circuit Court as found in section 629.

In support of this take now, for example, the case of Rosenbaum *v.* The Board of Supervisors, (28 Federal Reporter, 223,) decided in the Circuit Court of the United States for the district of California, 24th of May, 1886, by Justice Sawyer, who delivered an opinion in the present

case. What was decided in that case, bearing upon the present point, is thus expressed in the fourth paragraph of the head-notes:

"Under the California Code a mandamus is not regarded as an action at law or a suit in equity, in the ordinary sense in which those terms are used. But is a special proceeding to afford a remedy where there is not a plain, speedy, and adequate remedy in the ordinary courts of law."

In the body of the opinion, at page 225, the following language is used by Justice Sawyer:

"It may be well doubted, also, whether the case is a suit 'of a civil nature" where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars,' within the meaning of the removal act. *It is not a suit to recover a judgment.* There is no *ad damnum* clause in the petition, and no prayer for a money judgment. *No ascertainment of value is sought or had.* It is not a proceeding against the city of San Francisco, or any corporation or person *alleged to be liable for any money demand whatever.* It is merely a proceeding against certain officers personally, in their official capacity, who, it is alleged, refuse to discharge a public duty imposed upon them by law, for the purpose of setting them in motion—a proceeding to compel them to act; to discharge an official duty. *If the writ issues, it will, of itself alone, afford no remedy.* When respondents act, only *one* step towards a remedy is made. *The machinery is only started.* If a tax is levied and raised, other actions may be necessary *to establish the right*, and other proceedings by *mandamus*, against other officers, may be necessary to obtain a remedy. In Kurtz *v.* Moffitt (115 U. S., 487, S. C.; 6 Sup. Ct. Rep., 148) the Supreme Court, affirming the judgment of this court, held that a *habeas corpus* proceeding is not removable, because the matter in dispute does not involve a money value of $500. The case of Stewart *v.* Virginia (117 U. S. 613, S. C.; 6 Sup. Ct. Rep., 922) also appears to be directly in point on this question of money value."

Precisely so here. If this contract is abolished it secures nothing—ends nothing, and leaves Mrs. Hill at liberty to go on in courts of the State and establish her marriage by any proof except, at most, that which the Circuit Court has abolished.

The cases here cited by Justice Sawyer, especially Stewart *v.* Virginia, and the cases cited by this court in that case, do establish a legal rule and principle under which it is impossible to hold that this amazing equity suit, addressed to no other object than to strip Mrs. Hill and the courts of California of the right to make use of one item of proof made lawful by the laws of California in her suit for divorce and alimony, that divorce suit being one which the Circuit Court had no semblance of jurisdiction over, nor over the subject-matter thereof, is a suit of a civil nature at law or in equity.

But please observe carefully that whether this last proposition is true or not is, in this case, immaterial, because, as is seen by the authorities above cited, the other view above presented wholly excludes the court's jurisdiction, and this whole matter of the existence, continuance, and dissolution of the marriage relation, and the matters of rights springing directly out of that relation, are reserved to the State, as part of the police power of the State, and that Congress neither has nor can delegate to the courts of the United States any original and primary jurisdiction over this domestic relation.

Want of Jurisdiction Over Marriage Relation Involves Absence of all Jurisdiction Over Matters Confined, in Their Legal Operation, to the Proof or Disproof of Such Relation.

We are now brought to the next question in this case, namely:

Since the courts of the United States have no jurisdiction either over divorce, or over alimony, or over any

rights springing out of the relation of marriage, and since such courts cannot intermeddle with this relation or its rights, can the courts of the United States *indirectly* decide upon, control, or abolish the existence, the enjoyment, or the dissolution of such marriage relation by a judgment which determines that the relation does not exist, and that the alleged wife shall not be permitted to use, in any court or anywhere else, the evidence of the lawfulness of her alleged marriage?

In other words, the law being that the courts of the United States have no jurisdiction over the marriage relation and rights, can such courts take jurisdiction of, abolish, and cancel the evidence of marriage which is provided by, and made legal under, the laws of the States, and do this in such way and sense as that the decree of the court shall, in legal effect, operate as a divorce of the wife, by prohibiting her from using or asserting in any court, or anywhere, the evidence provided by such laws for establishing her marriage?

With very great and unfeigned respect for the learning of the judges who made the decision in question, it seems to us that the answer to this question plainly must be in the negative.

And under this head we wish, at the outset, to call the court's attention to the palpable *distinction* between the order of the court cancelling the marriage contract in the present case, and the decisions of the courts cited in the opinion below, (R., 67,) (such as the case of Railroad Company *v.* Schuyler, 17 N. Y., 599, and the case of Peak *v.* Highfield, 1 Russell, 559, R., 67) where the courts of equity cancelled instruments which were capable of vexatious use, and which directly affected common-law property rights of which these same chancery courts, so decreeing the cancellation, had jurisdiction.

It is the omission of the court below to give effect to this distinction that has led, as we submit, to the error

of the decree of revivor. Courts of equity have jurisdiction to put out of existence instruments (not on their face inoperative) affecting property rights, of which rights those courts have jurisdiction. This jurisdiction for cancellation of written instruments is one not exercised for any purpose other than such as is protective of *property* rights, the title to which is, by the instrument threatened, affected or clouded. Where no such threat is found in the instrument, no such remedy exists; and (to here adopt the words of Story, 1st. Story's Equity Jurisprudence, Sec. 700, a)—

"It is now fully established, that in such cases (of inoperative instruments) courts of equity will not interpose their authority to order a cancellation or delivery up of such instrument."

But assuming that such marriage contract is one coming within the class which a court of equity may cancel, the question left is, whether any court of equity has jurisdiction to order the cancellation of the instrument when that court, so cancelling, has no jurisdiction, and can have none, of the only subject-matter which the instrument can, by possibility, affect?

Surely it does not follow from the fact that a State court might cancel such an instrument that the courts of the United States, of limited jurisdiction, and which can touch no subject-matter except those expressly given to them by act of Congress, can decree the cancellation of instruments, which instruments are confined, in their operation wholly, absolutely, and clearly to matters over which the courts of the United States have no manner of jurisdiction, and which matters, so affected by said instruments, are confided to the exclusive jurisdiction of the State courts.

No case can be found in the courts where a bill in equity, *quia timet*, for cancellation of a writing has been

entertained when the writing affected no legal or equitable right justiceable in the courts.

In the present case this marriage contract is one which in no view legally conceivable can *directly* affect any other question than the question whether William Sharon and Sarah Althea Hill had contracted to be man and wife. It transferred and it affected no property, legal, equitable, or mixed. It contracted for the transfer of no property of any description. It was, in these respects, neither like a deed for property, nor an executory agreement for property, nor an assignment of property, nor a consummation of the *marriage* relation. It had no quality or function like a negotiable instrument, nor did it put in jeopardy any possible property right of Sharon in any other way or sense than an alleged oral admission of Sharon, made in the streets, would do, or than a "love letter" by Sharon to Sarah Althea Hill would do, or than his confessed "consummation" of the marriage contract did do. Its entire legal function and quality thus began and ended with its *tendency* to show that Sharon had promised to marry Hill. It bore upon no other subject or right than upon the subject-matter whether or not Sharon so promised to marry. There was and is no more jurisdiction in equity, therefore, to cancel this paper than there would be jurisdiction to cancel the memory of any man and woman who knew of a promise like unto that evidenced by this paper—no more jurisdiction to cancel this item of proof of marriage than to cancel the legal effect, as proof of marriage, which the California statute attaches to his admitted cohabitation with her as wife. (R. 11, fol. 17.)

All this which has now been said regarding the tendency, quality, bearing, and legal effect of this paper is said as a preface to the proposition which we now add. And that proposition is this: That, since the Circuit Courts of the United States have no jurisdiction over the

subject-matter of marriage or non-marriage, divorce or non-divorce, alimony or non-alimony, *proclaiming* wifehood or not proclaiming it, therefore the Circuit Court has no jurisdiction over this paper which bears upon no other possible or conceivable subject-matter than this subject-matter of marriage or not, over which the Circuit Court has no jurisdiction.

As showing that this written contract, abolished by the decree (R., 17), has, under the statute of California, the effect of proof, and that it is but *one* of the methods of proof authorized by the statute, we here insert the statute.

The laws of California upon the subject of marriage and the proof thereof are as follows:

By the Civil Code of California, it is enacted:

"Any unmarried man of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage."

The Code further provides:

"Consent to and subsequent consummation of marriage may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases."

The decision of the California courts make long-continued cohabitation as man and wife, and holding themselves out as such in society, not only sufficient but in absence of proof to the contrary conclusive evidence of the marriage, except in actions for crim. con., divorce, indictments for bigamy, and like cases, where marriage is the foundation of the claim to be enforced.

See People *v.* Anderson, 26 California, 129.

The court will please suffer us to attempt some further illustration of our position that it is impossible to hold

that the Circuit Court, which has no jurisdiction over the marriage relation, and of which the State court had and was then *exercising exclusive* jurisdiction, could decree the ~~distinction~~ jurisdiction of evidence made competent, in such State trial, by the State laws.

The various States have, respectively, their various police regulations in regard to how marriage is to be solemnized, what evidence thereof is to be created, and how such evidence is to be preserved, and how produced. In this respect the above-quoted laws of California, regarding how marriages are to be solemnized are no whit different, as to the legal principle here involved, from the laws upon the same subject of the States which require certificates of marriage. These statutes of California legalized, in the sense that it allows it to be used as evidence, this written instrument of marriage, which the decree below undertook to cancel and prohibit from being used in any place or court.

Suppose, now, that in a State where magistrates and clergymen are authorized to solemnize marriage, and are required to make and return to the proper public office certificate of such marriage, and where such certificate is required to be recorded, and where the statute makes that record proof of the marriage, that a marriage is found to be thus established by the recorded certificate of the officer or clergyman who performed the marriage. Suppose that in such case a man who has deserted his wife and taken his residence in a different State goes into a United States court of the State where his wife is, and asks a decree that in no State court or elsewhere shall this recorded certificate of marriage be received as evidence of the marriage, as prescribed by the State laws, and asks that that record shall be cancelled, upon the alleged ground that it was fraudulent.

Is it conceivable that the United States Court of Equity could take jurisdiction of such a case? Will it do to say

that if such recorded evidence is a fraud or a forgery it ought not to be permitted to have any weight in virtue of the State laws which authorize the making and recording of the marriage certificates?

The obvious and conclusive reply to such suggestion is that the question of forgery or no forgery, fraud or no fraud, is a question involving the existence of the marriage, and has no possible legal significance except as it bears on the issue, married or not, and about *this* question of the existence of the marriage the court has no jurisdiction to make inquiry, trial, or decision. Forgery or no forgery, fraud or no fraud, cannot be tried, in a suit for cancelling the written evidence of the alleged marriage, except as it contributes to try the question of the existence of the marriage. Nor can such recorded certificate be cancelled, except in executing or promulgating a decree deciding that there was no marriage; in other words, deciding that the wife should be, in effect, though not in name, pronounced no wife, and thus, in legal effect, divorced by a decree, having all the effect of a divorce, by a court without power to divorce or to grant alimony.

And yet of these matters of the existence of the marriage, and of the dissolution of the marriage, and of deprivation of the wife of her marital rights, this same United States court had not a semblance of jurisdiction.

This attempt to deprive the alleged wife, by decree of United States court, of the *evidence* of her marriage, and to deprive her of the right to use such evidence in the State courts which alone have jurisdiction of the question of marriage or no marriage, divorce or no divorce, is in substance, and almost without disguise, an attempt to accomplish in such court the divorce of the wife, and her deprivation of all rights of alimony, and other marital rights. It is plainly and palpably an attempt to accomplish, by *indirection*, what the court below, by means

of the *limitations* above named, which it gave to its decree *confessed* it had no jurisdiction over, to wit, prohibiting her from having, claiming, or asserting that she was a lawful wife.

It is an attempt, by slightly disguised *indirection*, to accomplish a divorce which the court recognized it had no power to accomplish *directly*. If the court had power to cancel this written evidence of marriage and prohibit its being used anywhere, then so, also, and *equally*, and for the *same* reason, could the court abolish all *other* evidences of the marriage. As we have seen in California the existence of the marriage relation may be proved by any evidence usually competent in the courts to establish a fact.

The legal force of this written evidence was not different *in kind* from any parole evidence going to establish the marriage. It was just like proof of courtship, of admissions of promise, of holding out as wife, of cohabitation, and the like. It only differed from these other proofs in *force* or *degree*. Hence, any decision which holds that *this written* evidence of marriage may be, in the Federal courts, prohibited, by injunction, from being used in the State courts to secure the wife her marital rights, is a decision which holds that *every other* form, degree, and particle of evidence going to assert or establish the existence of such marriage may be equally, in the Federal courts, enjoined from being used in the State court having admitted and exclusive jurisdiction of this matter of alleged marriage and divorce.

Again, we submit that the assumption of the Circuit Court to render the decree prohibiting the use of said evidence by Mrs. Hill anywhere in any court, or otherwise, thus attempting to strike down the exclusive jurisdiction of the State courts in the matter of Mrs. Sharon's pending suit for divorce and alimony, is not only—to here adopt the words of this court in Nouge *v.* Clapp,

101 U. S., 554—unwarranted by the relations which subsist between the courts of the United States and the States, and an invasion of the powers belonging to the courts of the States, but it is moreover an act in direct contravention of the prohibitions found in section 720 of the R. S. This section is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It is not here questioned that the position of the Circuit Court, in the opinion below, that where a Federal court first obtains jurisdiction in a matter where such Circuit Court has jurisdiction of the subject-matter and party, there it may resort to injunction, or any other writ recognized by the established chancery practice as appropriate in such cases, which is ancillary to such jurisdiction already so attached in the Federal courts; and that, under this ancillary power it may enjoin, where that is requisite to make its jurisdiction effective, a proceeding in the State court, notwithstanding the provisions of section 720.

But the obvious and conclusive reply to this position taken below is found in the fact that the Circuit Court of the United States had no jurisdiction of the subject-matter of cancellation of this marriage contract, and besides, such decree cancelling a mere item of proof is not known to equity jurisprudence. The case in this court which hold that such injunction cannot issue in a case like this against a State court are numerous and conclusive.

In the case *In Re.* Sawyer, (124 U. S., 200,) the Circuit Court of the United States undertook to restrain the mayor and committee of a city from removing a city

officer upon charges filed against him for malfeasance in office; and this court held that the Circuit Court had no jurisdiction to restrain the removal of such officer, and that an injunction issued upon such a bill, as well as an order committing the defendants for contempt in disregard of the injunction, is *absolutely void*, and that the parties so committed were entitled to be discharged on *habeas corpus*.

In regard to this injunction and the operation of said section 720, this court (pages 219, 220) says:

"The restraining order of the Circuit Court was void, because in direct contravention of the peremptory enactment of Congress that the writ of injunction *shall not be granted by any court of the United States to stay proceedings in any court of a State, except when authorized by a bankrupt act.*"

The court here cites—

Diggs *v.* Walcott, 4 Cranch, 179.
Peck *v.* Jeness, 7 Howard, 612.
Watson *v.* Jones, 13 Wallace, 679, 719.
Haines *v.* Carpenter, 91 U. S., 254.
Dial *v.* Reynolds, 96 U. S., 340.
Sargeant *v.* Helton, 115 U. S., 348.

Recapitulation.

We submit, in view of what has now been gone over, that it is plain that in rendering the original decree in this case against Hill (R., 17) the Circuit Court was without jurisdiction—

First. Because the attempt to abolish and put out of existence a mere item or instrument of evidence, such item of evidence not being a document conferring any property rights whatever at law or in equity, was dealing with a subject-matter and attempting to exercise a jurisdiction not known to the chancery law, and the case was

not, therefore, a "suit of a civil nature" within section 629, defining the jurisdiction of the Circuit Court.

Second. The court was without jurisdiction because said proceeding was, in substance and in fact, a disguised attempt of the Circuit Court of the United States to deprive Mrs. Sharon of her rights as a married woman, and thus, in legal effect, an attempt to divorce her from her husband, but to accomplish that divorce without securing to her any marital rights whatever; and being such a suit it was a subject-matter over which the Circuit Court of the United States had no manner of jurisdiction.

Third. Because such injunction suit is expressly prohibited by section 720 of the Revised Statutes.

The Circuit Court being without jurisdiction, as just stated, and for the reasons just stated, and the original decree being absolutely void, the decree of revivor is, for the same reason, absolutely void; and hence such infirmity of the revivor decree can be asserted now in any competent jurisdiction, owing to the fact that the decree so revived is absolutely void.

Void Decrees Reversed on Appeal.

We now come to the question whether the said decree of revivor is one which can be appealed and reviewed in this court. And under this head it is first to be observed that the fact that the decree of the Circuit Court below was rendered without jurisdiction and is void, does not defeat the jurisdiction of this court on appeal.

This court, in the case of

United States *v.* Buckabee, 16 Wallace, 414–435, held what the sixth paragraph of the syllabus thus states:

"Where a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a

claimant, an appellate court must reverse. *It is not enough to dismiss the suit.*"

This court in the case of the

Lake Michigan Railway Co., *et al, v.* Swan *et al,* 111 U. S., 379–385,

reaffirms this decision, the court here quoting and repeating the language of Justice Clifford, employed in deciding the case of Buckabee, *supra.* The language quoted by Justice Matthews from the case of Buckabee, is as follows:

"Usually where a court has no jurisdiction of a case, the correct practice is to dismiss the suit; but a different rule prevails in an appellate court in cases where the subordinate court was without jurisdiction and has given judgment or decree for the plaintiff, or improperly decreed affirmative relief to a claimant. In such a case the judgment or decree in the court below must be reversed, else the party which prevailed there would have the benefit of such judgment or decree, though rendered by a court which had no authority to hear and determine the matter in controversy."

Concurrent Jurisdictions.

Having shown, as we submit, that the court below could not lawfully render the original decree in Sharon against Hill, because the subject-matter was not one within the jurisdiction of the court, it is, of course, unnecessary here to consider the point so elaborately discussed in the opinions below, to wit, the point that in cases of concurrent jurisdiction on the part of several courts there the jurisdiction which first attaches supersedes the jurisdiction of the other court. We allude to this matter only because it might be suggested, in reply to what we have above said regarding the position that this attempt to abolish the marriage contract, in the Circuit Court, (such contract bearing alone upon a sub-

ject exclusively within the jurisdiction of the State court,) is an invasion by the Circuit Court of the jurisdiction of the State court, that the decree abolishing the marriage contract is no such invasion because the Circuit Court *first obtained jurisdiction* and thereby superseded that of the State court.

Of course, such reply, if made, is no reply, provided the Circuit Court had no right to take jurisdiction. This is so, simply because, in such case, it is not a case of concurrent jurisdiction at all.

Besides this, it was admitted, even in the court below, that the suit in the State court for divorce and alimony, and the one in the Federal court for rescinding the marriage contract, *were not the same cases;* (10 Sawyer, 394;) and therefore, if it were true that the Circuit Court had jurisdiction, it would not present a case for the application of the doctrine applicable to two courts of *concurrent jurisdiction* having before them the *same* case, which says that the court first obtaining jurisdiction supersedes the jurisdiction of the other. But this last doctrine has no manner of application in the present case, simply because it is not a case where two courts of concurrent jurisdiction are in possession of the *same* case. But it is a case where two courts had each before it a case in which *some one or more items of proof, or fact, were* common to the two; as, for example, whether Sharon signed the written contract. In such a case as that, we submit that the law is that the court which first decides the fact common to both cases, decides it for all cases. (See such cases as Duff *v.* Lyte, 5 Watts, 131.)

But, really, this point about concurrent jurisdiction has no legitimate place in the present discussion, simply because there is here no such circumstance as concurrent jurisdiction in two courts. The matter of attacks upon, and rights springing from the marriage relation are matters exclusively within the jurisdiction of the State

court; and the Federal court can attack such marriage relation neither for the purpose of its interruption, or its dissolution, or for other purpose; nor can such Federal courts attack, as we have seen, any of the instrumentalities of proof of such relation appointed by the laws of the States protective of the sanctity and enjoyment of that relation.

Decree Final and Appealable.

We now turn to the question whether the present decree of revivor is appealable under section 692 of the Revised Statutes, allowing the appeal from final decrees.

On this point, please fix in mind, again, the familiar maxim which we have had occasion in another connection to appeal to. That maxim is expressed in Freeman on Executions, note 2, section 16, in these words:

"An execution issued on a void judgment and an execution issued *without any judgment are alike* invalid, for neither has any legal foundation on which to rest."

So, also, we have quoted from the same work, section 20, these words:

"It is not sufficient that the judgment on which execution issues appears to be final and is perfect in form. It must at least be so far valid as to be impregnable to collateral assault. A void judgment is in legal effect *no judgment.* By it no rights are divested. From it no rights can be obtained. Being *worthless in itself, all proceedings founded upon it are equally worthless.* It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void."

The cases in this court announcing precisely the same thing, and in substance the same words, are almost innumerable, and a few of them have been already alluded to.

Where the want of jurisdiction arises from the fact that the *subject-matter* is not within the jurisdiction of the court, and where no facts need be looked into by the court to see the want of jurisdiction, such as the fact of residence in different States, and the absence of jurisdiction is disclosed by the statement of the *subject-matter* in the record, there the authorities all show that the courts mean precisely what they say when they use this language quoted from, Freeman, namely, that the judgment or decree in such case is absolutely void; that it is the same as *no judgment at all.* It is literally blank paper—vacuum.

Suppose the original suit below, of Sharon *v.* Hill, had been one, in the *Circuit Court of the United States*, for divorce, or for alimony, or for both, and the Circuit Court had decreed divorce and alimony. That would present confessedly a case where the decree was absolute nullity. But we have seen, by the authorities above cited, that such a decree as just supposed would be no *more* a nullity than one where the United States court *undertook to abolish an instrument which had no legal significance, quality, or office except as it tended to establish the marriage relation, over which relation the Federal courts are without jurisdiction,* and as to which marriage relation exclusive jurisdiction is reserved to the States as part of their police power, and which marriage relation the Federal courts can in no degree invade, either by acting directly upon the marriage relation or by acting upon instrumentalities which have no legal office except as they are appointed by the State laws, or the common law, to prove or disprove the marriage relation.

Now, if this position is sound, and if the decree of the 15th of January, 1886, (R., 17,) is indeed blank paper, then self-evidently, when the bill of revivor was filed in the Circuit Court 12th of March, 1888, (R., 23,) it was filed to *revive a nullity.* The party filing that "bill of

revivor," as it is called, was exactly in the same plight as he would be if his bill of revivor showed that there was no attempt at ever rendering said original decree of the 15th of January, 1886; or in the same plight as if his bill of revivor showed that the original decree was rendered by a justice of the peace; or in the same plight as he would be if his bill of revivor had averred that the United States court had rendered a decree of divorce and alimony, the revivor of which was applied for.

This being self-evidently so, and so simply because the original decree "is as if it had never existed," we are thus brought to the question whether a decree of revivor attempting to revive a nullity, a thing which has no existence, does not present a case of a bill in equity clearly and palpably bad on its face, and demurrable?

Obviously it does; and, therefore, this bill of revivor is no bill of revivor at all, but is a radically defective original bill in equity, pure and simple.

And so as to the decree. The decree attempting to revive a nullity is a decree under an original bill, the decree itself having all the radical infirmity of the original bill, and being absolutely void.

These considerations bring us to the precise condition of things covered by the cases, already cited, of—

Railway Co. *v.* Swann, 111 U. S., 385, and
United States *v.* Buckabee, 16 Wallace, 414,

holding that—

"Where a subordinate court, which had no jurisdiction in the case, has given judgment for the plaintiff or defendant, or improperly decreed affirmative relief to a claimant, an appellate court must reverse. It is not enough to dismiss the suit." (16 Wallace, 414.)

Therefore this decree though void, for want of jurisdiction to render it, is, nevertheless, reversable here, provided it is a "final" decree within section 692.

But we now submit to the court that the present "bill of revivor," as it is called, is not technically a mere "bill of revivor," as to which this court holds that—

"The bill of revivor is not a commencement of a new suit, but is a mere continuation of the old suit." (Clark *v.* Matheson *et al.*, 12 Peter, 171.)

And that under the 31st section of the Judiciary Act of 1789 Congress meant to—

"Treat the revivor of the suit by or against the representatives of the deceased as a matter of right, and as a mere continuation of the original suit." (12 Peters, 172.)

When the original bill was filed for an injunction on the 3d of October, 1883, (R., 5,) Mrs. Sharon claimed to be the wife of the complainant, and was not the wife of Terry.

When the *nunc pro tunc* decree was rendered on the 15th of January, 1886, (R., 17,) Sharon was dead, and whatever rights, if any, devolved by such death on Mrs. Terry were *then* added to her rights by the death of Sharon, which occurred on the 13th of November, 1885.

On the 7th day of January, 1886, Mrs. Sharon was married to David S. Terry; her marriage to the said Sharon having been claimed to have occurred on the 25th of August, 1880.

The divorce suit brought in the State court by Mrs. Sharon was commenced November 1st, 1883, (R., 11,) and on the 24th November, 1883, the record of said divorce suit was filed in the United States Circuit Court for the Northern District of California. (R., 12.)

On the 31st of December, 1883, a stipulation between the parties was filed in the Circuit Court returning the case from the United States court to the State court, and in which it was agreed that the case should be tried before Sullivan, J., and without a jury.

The trial before Sullivan was begun on the 10th of March, 1884, and on the 24th of December, 1884, the court rendered its decision, declaring that the parties were husband and wife, and that the written marriage contract was genuine; and, based on this decree, the first answer by Mrs. Sharon made the claim that the matter involved in Sharon's original suit in the Circuit Court had become *res judicata.* (R.; 13.)

The supplemental answer, filed February 24th, 1885, in the divorce suit, alleged that since her first answer the Superior Court for San Francisco, in the case of Sharon *v.* Sharon, had filed its findings, adjudging the said marriage contract genuine, and that the parties were husband and wife.

The decree of the Superior Court of San Francisco of the 24th of December, 1884, was affirmed in the Supreme Court of the State.

Sharon conveyed *all* his property to his trustees on the 4th of November, 1885.

From these facts it will be observed that the following *changes* in the *status* of the parties occurred after the legal date of the original decree against Mrs. Hill of the 29th of September, 1885, to wit:

1. Sharon died and thereby devolved on Mrs. Sharon whatever property, if any, came through his death.

2. The Superior Court rendered the decree establishing the validity of the marriage and Mrs. Terry's rights of alimony.

3. The defendant Hill had married Judge Terry and his rights and interests in his wife's estates, whatever they were, attached after the original decree, and after the death of Sharon.

These changes in the *status* of the parties after the date of the original decree rendered it indispensably necessary that the bill of revivor, so called, should be something

else, or more than a technical bill of revivor, such as is resorted to where no change has occurred except an abatement by death.

Now, we submit, under this state of the case, it is not true that this is a mere bill of revivor, where the parties have no right to make any other showing or defense than simply to show that the party asking to be substituted in the place of Sharon was not such a successor in interest, by operation of law or will or otherwise, as to be entitled to stand in Sharon's shoes. On the contrary, it presents a case where, owing to the death of Sharon and the marriage of his alleged wife to Terry, new property rights had attached in favor of a new and indispensable party to the suit, Judge Terry, whose interest in his wife's estate, as affirmed by the Supreme Court of California, or otherwise established, could not be cut off or affected except by the means of being made party, as was here done. That a decree such as is prayed for in this bill of revivor, so called, is a decree on an original bill, as distinguished from a decree under a technical bill of revivor, we submit.

There is no better definition to be found in the books, defining the cases in which a supplemental bill, or a bill in the nature of a supplemental bill, must be resorted to, than that found in the definition of Lord Regedale, quoted in note 4, section 346, Story's Equity Pleadings. That definition is in these words:

"When any event happens subsequent to the filing of an original bill which gives a new interest in the matter in dispute to any person not a party, a supplemental bill may be filed. * * * *If a supplemental bill is filed before a decree on the original bill, both bills are heard together; if after the decree, the cause is heard upon supplemental bill only.*"

All the books and cases show that when a new interest is brought into the case, such as is brought in by the

marriage of Mrs. Terry, after the decree, the husband must be made a party defendant, and must have opportunity to defend such new interest, before any decree of revivor, or decree upon such supplemental bill is tolerated.

More than this; not only are the changes just pointed out, which occurred in the *status* of the parties after the date of the original decree, such changes as compel resort to a supplemental bill upon general principles, but this matter is expressly decided, to wit, that, where a female party marries before or after decree, and a revivor becomes necessary, the new parties, brought into interest by the marriage, must be made parties by supplemental bill; and that a mere revivor cannot be decreed without such supplemental bill.

See Griffin *v.* Morgan, L. R., 4 Ch. Ap., cited 3 Daniel's Ch., 2359.

It being so that where a supplemental bill is filed *after* a decree, the case is heard upon the supplemental bill alone, as stated in the above quotation from Lord Regedale, it, of course, follows that a trial is had regarding such new rights presented by the supplemental bill precisely as the same rights would be tried upon any original bill. On this point 2d Daniel's Chancery, page 1534, says:

"The proceedings upon a supplemental bill of this description are the same as the proceedings upon an original bill, and the defendant may adopt the same means of defense."

What has, therefore, now been said regarding these supplemental facts introduced by the bill of revivor, demonstrates that the decree which has been rendered upon that bill is a "final" and appealable decree which if jurisdiction did in fact exist to render such decree, binds Judge Terry as effectually as any decree on an original bill could—binds him not only as to his exclu-

sion from all interest in his wife's claimed estate as secured to her by the Supreme Court of the State, or otherwise, but binds him as to all costs and expenses incurred in the two suits and covered by the decree of revivor.

The bill of revivor expressly orders, as against *both* defendants, Terry and his wife, that the executor "have the full benefit, rights, and protection of such final decree, and full power to enforce the same, against the said *defendants*, and EACH of them, at all times, in all places, and in all particulars." (R., 28.)

In other words, these changes rendered necessary a supplemental bill, as distinguished from a bill of revivor, and such supplemental bill was filed in this case (R., 21).

That necessity of resort to a supplemental bill as distinguished from a mere bill of revivor, was and is under the established chancery practice rendered indispensable because, as we have seen—

1. By the inflexible maxims of equity jurisprudence no order *nunc pro tunc* is ever allowed to work positive injustice; but as stated in Bouvier "leave of court must be obtained to do things *nunc pro tunc*, and this is granted to answer the purposes of justice, but never to do injustice." *Nunc pro tunc* decrees never allowed to affect, *by relation*, rights acquired before the actual date of the decree.

Dawson *v.* Scriven, 1 Hill's Ch., 177.
See, also, 103 U. S., 62.

2. Judge Terry's marital rights in his wife's estates as secured to her by the decree of the court of California, or otherwise, attached on the 7th of January, 1886, before the actual date of the *nunc pro tunc* decree, and, therefore, he took his rights unaffected by such decree in a case to which he was not a party; and his presence in the case was indispensable by supplemental bill or otherwise, before he could be bound.

3. Because of the inflexible rule of equity, elsewhere quoted herein, which commands that—

—"When any event happens subsequent to the time of filing an original bill which gives a new interest in the matter in dispute to any person not a party to a suit, a supplemental bill must be filed; if a supplemental bill is filed *before* a decree on the original bill both bills are heard together; if after a decree, then the case is heard upon supplemental bill." (Story's Equity Pleadings section 346, Note 4.)

The following are some of the features of this supplemental bill, or bill in the nature of a supplemental bill, which made a supplemental bill as distinguished from a mere bill of revivor necessary, namely:

(A.) The suit was peculiar in this, that it was a suit by a husband against his own wife (provided the decree of the Supreme Court of California is right). Therefore the death of the complainant changed the *status* and property rights of the wife, provided she were a wife, and, provided the decree of the State court, decreeing alimony, is to control the property rights of the wife.

(B.) The marriage of defendant Hill to Terry made it necessary for this supplemental bill, or bill in the nature of a supplemental bill, to aver that fact. (R., 23.)

(C.) This marriage of Hill to Terry gave to the husband, Terry, whatever property rights the husband has in his wife's estates; and in order to conclude and cut off these rights of the husband in the estates claimed by the wife under the said decree awarding alimony, or otherwise, it became necessary to make the said David S. Terry a party defendant; and, accordingly, this supplemental bill, or bill in the nature of a supplemental bill, asks for a subpœna to revive the suit directed to the said *David S. Terry and his wife*, requiring "*them*" by a certain day to appear as defendants and answer why the

original decree should not stand revived against, observe, not Mrs. Terry, as the original decree was, but revive it against "*them.*"

RECAPITULATION.

We restate the positions of this brief for the purpose of avoiding all possible misapprehension.

1. The decree of revivor (R., 28) is a decree rendered on an original bill in equity, and is, therefore, "final" and appealable to this court, because the original decree (R., 17) was, and is, owing to the absence of jurisdiction of the subject-matter, an absolute nullity, and can, therefore, give no vitality to the pretended decree of revivor of the 17th of September, 1888.

2. Whether the decree of the 15th of January, 1886, is void or not, still, because of the fact that new rights of David S. Terry attached to his wife's property involved in the suit, *before* the *nunc pro tunc* decree was in fact decided to be made, and, because he was no party to the suit at the date of that decree, therefore, his rights were not concluded by such decree, and he thus became a necessary party to any suit, the decree in which should bind his said rights; and, accordingly, he was made party by the supplemental bill (called a bill of revivor) of the 12th of March, 1888; (R., 21;) and thus new rights and parties thus introduced into the bill of revivor made it to be in law a supplemental bill, or a bill in the nature of a supplemental bill, as well as a bill for revivor. This being so, the decree rendered on such supplemental bill is an original decree, and final and appealable to this court without regard to the question whether the court had jurisdiction to render the original decree.

3. Even if neither of the two preceding propositions should be sustained by the court, and the so-called bill of

revivor should be deemed to be such, yet even in such case each party to the bill of revivor, including Judge Terry and his wife, were entitled to make defense that the executor, prosecuting the bill of revivor, had no such interest in the subject-matter as to entitle him to be substituted in the place of William Sharon, deceased, by showing that Sharon on the 4th of November, 1885, deeded all his property—real, personal and mixed—to trustees, and, hence, that the executor could not be substituted in place of Sharon by the decree of revivor. And this point was presented by demurrer to the bill of revivor, which failed to set forth any such interest in the executor as entitled him to file the bill of revivor, and the overruling of this demurrer and rendering the decree of revivor, so-called, without leave so to answer, was the rendition of an original and final decree, and is, therefore, appealable to this court.

We conclude this brief by saying that it would unduly extend this brief to enter into a review of the authorities presented in the opposing brief, going to the point that such decree of revivor is not a final decree; and, besides, it is not necessary to do so because the authorities presented in that brief, are—

1. None of them pertinent or applicable to a bill of revivor such as the present; and,

2. Because the authorities we have gone over, and the considerations presented, furnish an answer, as we most respectfully submit, to the positions and authorities of such opposing brief.

We conclude, by invoking for the case of our clients, that usual vigilance and care of the court, in protection of the important rights of our clients, which will render unimportant the defects of this presentation of their case. We make that invocation in the present case especially

because that, whilst we are certain that the positions taken in this case are not in any essential degree erroneous, yet the fact that the case came into our hands something less than a week before the time named in the motion, to wit, the 4th of March, 1889, for the submission of the motion to the court, rendered it impossible for us to completely acquaint ourselves with the enormous mass of facts and literature which has accumulated in the case, and is pointed to in the record, and to fully arrange and present all the considerations and authorities which more time would have enabled us easily to submit in support of said positions of this brief.

SAM'L SHELLABARGER,
J. M. WILSON,
Attorneys for Defendants.

Record Brief

IN THE

Supreme Court of the United States.

No. 1462.

DAVID S. TERRY and SARAH A. TERRY, Mr Wife,
Appellants,
vs.
FREDERICK W. SHARON, Executor of WILLIAM SHARON, Deceased, Appellee.

Brief for Appellants in Resistance of Amended Motion to Dismiss and Affirm.

By SAMUEL SHELLABARGER and J. M. WILSON.

THOMAS McGILL & Co., Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

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vs.
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No. 1462.

As the appellee, Sharon, executor, has, since his motion to dismiss on the sole ground that the decree appealed from is not "final," was submitted, amended his motion by including in it a motion to affirm, we avail ourselves of the right secured by the rules and leave granted by the court, to add some suggestions and citations of authority to those found in appellant's first brief.

I.

Our first suggestion is that, since this court cannot, under paragraph 5 of rule 6, affirm what is a mere order, not final in its character, but in the nature of process in execution of a preceding final decree, and since the *sole* foundation of the present motion to dismiss, as such foundation is relied on in the appellee's brief, is that the order here appealed from is not final for the single reason that *it is an order in the nature of an execution of a prior judgment or decree*, therefore this new motion, now made to affirm, is a virtual admission that said decree is a final decree, because such only are capable of being here affirmed or reversed.

It is such virtual admission because, if the appellee did not regard said decree appealed from as a final one, he would hardly resort, as he has, to the extraordinary step of arresting the action of this court upon his said submitted motion, and of submitting a new motion, which, on its face, is incapable of being granted if said decree is not indeed a final one and such as is capable of being affirmed by this court.

II.

Our next suggestion is to add some references to authority in vindication of the proposition contained in our first brief, (pp. 39–40,) which asserts that even if the order of revivor were a mere technical revivor, and were not a decree based upon a supplemental bill, or on a bill in the nature of a bill of revivor, yet said decree is "final" in the sense of the statute regulating appeals to this court. And in support of this point let it be observed that the following, from 1st Story's Equity Pleadings, (sec. 829, 9th edition,) is thoroughly settled law as applicable to mere bills of revivor, technically so-called:

"If a bill of revivor is brought without sufficient cause, to revive a suit against the defendant, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the *plaintiff is not entitled to revive the suit against him.*"

Citing Mitford's Equity Pleadings by Jeremy, 289–290.

"Or if the plaintiff is not entitled to revive the suit at all, although a title is stated in the bill, so that the defendant cannot demur, the *objection to the plaintiff s title may be taken by way of plea.*"

In section 830 the same author states:

"The want of proper parties may also be objected to a bill of revivor."

In Betz *v.* Dana, (2 Sumner, 386,) it was held, by Judge Story, that, whilst, on a bill of revivor, the sole questions before the court are the *competency of the parties, and the correctness of the frame of the bill of revivor*, the objection to a bill of revivor may be *taken by demurrer that the parties in interest are not before the court.* And this is one of the precise points meant to be raised by the demurrer below. See R., 25; also, 1st Brief, pp. 34 and 35.

It is, therefore, thoroughly settled that in case of a *mere* technical revivor, rendered necessary by death of a party after, as well as before, decree a new proceeding, by bill, is rendered indispensable, and that the party who is substituted plaintiff, instead of the deceased plaintiff, *must establish his acquisition of the interest, in the subject-matter of the suit, which was held by* the deceased party; that new process is necessary, and a new issue is made, to wit, whether the proposed complainant in the revivor suit is indeed successor in interest of the deceased party; that this issue is tried upon the bill of revivor, the answer to the bill of revivor, or the plea to the bill of revivor, or the demurrer to the bill of revivor, as in other cases.

This being so, it brings such decree on the bill of revivor within the ruling of this court as found in such cases as Davies *v.* Corbin, 112 U. S., 36, where this court held that an order, awarding a writ of mandamus, which directs the collector of taxes of a county to collect a tax that had been duly levied and extended on the county books, is a final judgment, subject to review in this court.

In defining the test as to what is a "final" decree, the court says:

"While the writ of mandamus in cases like this partakes of the *nature of an execution to enforce the collection of a judgment* it can only be got by instituting an independent suit for that purpose. There must be, first, a *showing* by the relator in support of his *right to the writ;* and, second, *process to bring in the adverse party whose action is*

to be coerced, to show cause, if he can, against it. If he appears and presents a defense, the showings of the parties make up the pleadings in the case, and any issue of law or fact that may be raised must be judicially determined by the court before the writ can go out. Such a determination is, under the circumstances, a judgment in a civil action brought to secure a right, that is to say, process to enforce a judgment. The proceeding may be likened to a creditor's bill in equity which is resorted to in aid of execution. The writ *which is wanted cannot be had on the application of a ministerial officer.* It can only issue after the judgment of the court to that effect in an independent adversary proceeding instituted for that special purpose. Such a judgment is in our opinion a final judgment in a civil action within the meaning of that term as used in the statutes regulating writs of error to this court."

Now, we submit, that, although in a sense such a bill of revivor is a continuation of the original case, yet it is, nevertheless, an independent proceeding in the sense that it requires and compels a new bill in equity, new process to issue against all necessary parties, raises a new issue (to wit, the succession by the revivor complainant to the property rights of William Sharon), and which issue must be raised by bill, by answer, by plea, or by demurrer, as the case may require; and on these pleadings is adjudicated by the court; and, says this court, such a judgment is, in our opinion, a final judgment. (112 U. S. R., 40.)

On this and like authorities, therefore, we submit that if the appellant were wholly wrong in the first and second propositions stated on the thirty-ninth page of his original brief, yet the present decree is a "final" decree within the sense of the statute regulating appeals to this court.

III.

Our next addition to our first brief is one introducing additional views and authorities in support of the proposition first stated at page 6 of our first brief, namely, that the regulation of marriage and divorce and the enforcement of rights springing out of that relation are part of the police powers of the States not delegated to the General Government, and that Congress has not given to the courts any jurisdiction, either *direct or indirect*, over these subjects; and hence, none under which the Circuit Court could cancel the written contract of marriage.

In making this addition to the brief we fear that we may be arguing the axioms of the law, and yet we confess it is impossible for us to see how the jurisdiction of the Circuit Court below, in rendering the decree appealed from (R., 17), can be maintained without violating these axioms.

Our present propositions we may repeat in the following words:

1. Where a governmental power is, as between the United States and the States, one of the police powers of the States not coming within some power delegated to the General Government, either expressly or as the necessary incident of some expressly delegated power, there the courts of the United States have not received, and cannot receive, jurisdiction over such non-delegated police matters.

2. That neither the police power of the States over the *formation* of the marriage relation, nor the duties and rights springing out of that relation, nor the cases in which, or the processes by which, that relation may be dissolved, or may be qualified or interfered with, nor the rights of the wife to support or alimony which shall be derived therefrom, are amongst the matters or the powers

delegated to the General Government; and any interference with either of these by the United States courts, either directly or indirectly, is prohibited.

Regarding any *indirect* attempt of the United States to invade any of the reserved police powers of the States, the rule of prohibition against such indirection is thus stated (Cooley's Constitutional Limitations, side page 483):

"And any such interference by *indirect* means of taxation *is quite as much beyond the power of the National Legislature as if the interference were direct and extreme.*"

There is probably not in existence a more concise and instructive statement of this rule, prohibiting the General Government from "crippling" or "impairing," even by indirection, the reserved powers of the States regarding the State judiciary and the like, than is furnished by the opinion of Nelson, Justice, in the case of the—

Collector *v.* Day, 11 Wallace, 122.

In enforcing the proposition that these reserved powers of the States (p. 125) "should be left free and *unimpaired*, and should not be liable to be *crippled*, much less defeated," this opinion proceeds to say (p. 126):

"And more especially those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department and the appointment of officers to administer their laws. * * * We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have the said power to maintain a judicial department. * * * It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect of which the *State is as independent of the General Government as that Government is independent of the States.* * * *

If the means and instrumentalities employed by" the General "Government to carry into operation the powers granted to it are, necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reason, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as the other. * * * In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government whose means employed in conducting its operation if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

Now, apply this reasoning to the question we now deal with. If the State courts are to have the *exclusive* jurisdiction, and the "unimpaired," "unrestrained," "uncrippled" right and power to decide upon the existence, continuance, and severance of the marriage relation, and if the General Government is, at the same time, to have, through its courts, the power to prohibit, or, under a bill in equity, to enjoin the use, in these State courts, of any and all evidence made competent by the law of the States to establish the existence of the marriage relation—to establish the marital rights of the wife—to establish the right to alimony—to establish the right to a divorce, and the like—then what becomes of this "exclusive jurisdiction" of the State courts over these police affairs pertaining to the marriage relation so reserved to the States?

But whilst the absence of all such Federal power to enjoin seems so utterly palpable as to require no adjudications in prohibition thereof, yet such adjudications are in fact quite abundant, holding that neither the courts nor Congress can prohibit the use in the State courts of any instrumentalities of evidence made lawful under the reserved judicial and police powers of the States.

In the case of Fifield *v.* Close, (15 Mich., 505,) cited in Cooley's Constitutional Limitations (side page 403), it was held by the court that so much of the internal revenue law as requires process in State courts to be stamped as a condition to the validity of legal proceedings is unconstitutional and void.

In the opinion in that case the court cites a great multitude of decisions in this court, from MacCullough *v.* Maryland 4 Wheaton, 316, down, wherein this court has held that the power to tax involves the power to control and destroy; and, therefore, that the States cannot tax the instrumentalities necessary to the enjoyment of the powers conceded to the General Government. And from these cases the court reaches the conclusion that if no such power exists in the States to "cripple" the Federal judiciary, then, equally, the Federal power cannot impair or "cripple" the State judiciary in the exercise of the judicial powers reserved to the States.

The court says:

"And the question we are called upon to decide is, therefore, whether Congress has power to put an end to the exercise of the judicial power of the States. * * * A State without courts to enforce its own laws is an impossibility. And if Congress can destroy or control the State judiciary, it can utterly abrogate the State itself. * * * The great mass of common-law rights and remedies asserted by one citizen against his neighbor *are beyond the reach of the Federal Government.* Our whole system is based upon the principle that local affairs must be administered by State authority, unless where peculiar circumstances have led to the establishment of definite exceptions resting on special reasons of public policy. * * * There is nothing in the Constitution which can be made to admit *any interference* by Congress with the secure existence of any State authority within its lawful bounds. And any such interference by *indirect means* of taxation is quite as much beyond the power of the national legislature as if the interference were direct and extreme. * * * The courts of Indiana and Wisconsin

have arrived at the same result. (Warren *v.* Paul, 22 Ind., 276; Jones *v.* Keep, 19 Wis., 369.) The interference is not remote, but direct, and prevents any action whatever by the courts of justice in private suits, until the tax is paid. Its makes its payment a condition of jurisdiction."

In the case of Carpenter *v.* Snelling, 97 Mass., 452–458, the Supreme Court refuses to extend the provisions of the act of Congress of 1866, c. 184, sec. 9, to the State courts, although such act broadly, and without limitation confining the prohibition to the Federal courts, prohibited any of the enumerated instruments, not stamped, from being "*admitted or used as evidence in any court until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereunto, as prescribed by law.*"

The court said:

"We are not disposed to give a broader interpretation of the statute," than applying it to the Federal courts.

"We entertain grave doubts whether it is within the Constitutional authority of Congress to enact rules *regulating the competency of evidence on a trial of a case in the courts of the several States, which shall be obligatory upon them.* We are not aware that the existence of such a power has ever been judicially sanctioned. There are numerous and weighty arguments against its existence."

This ruling by the Supreme Court of Massachusetts is repeated in Green *v.* Holway, 101 Mass., 243.

The same thing is decided in Griffin *v.* Ranney, 35 Conn., 239, where the court approves the decisions denying the power in Congress to so tax proceedings in the State courts. The court cites with approval the cases of—

Warren *v.* Paul, 22 Ind., 276.
Jones *v.* Keep, 19 Wis., 369.
Fifield *v.* Close, 15 Mich., 505.
Union Bank *v.* Hill, 3 Coldwell, 325.

In the case of Craig *v.* Dimmick, 47 Ill., 308, the court expressly decides this question. The head note indicating this decision is in these words:

"While the Congress has the power to require instruments, created and valid under State laws, to be stamped, and has the consequent power to punish by fine any intentional evasion of the law in that regard, *yet it has not the power to require such instruments to be stamped as a prerequisite to their validity and binding force, or to their admissibility in evidence in the State courts.*"

The opinion in this case is by the Chief Justice, and is quite elaborate and instructive. Amongst other things found in this opinion, the following is especially apposite in the present case. The Chief Justice says (page 316):

"It is eloquently remarked by Chancellor Kent: 'The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties which flow from our civil and *domestic relations*, fall within the control, and, we might almost say, the *exclusive* cognizance of the State governments. We look essentially to the State courts for protection of all these momentous interests.'"

1 Kent's Commentaries, 483.

This decision is repeated in

Bunker *v.* Green, 48 Ill., 243.

United States Express Co. *v.* Haines, *Ib.*, 248.

The decisions going to this same effect are collected in note 1 side page 483, Cooley's Constitutional Limitations, top page 599.

It seems to us, therefore, quite impossible to escape from the conclusion, forced upon us by these authorities, that it is beyond the power of Congress to give to the Federal courts jurisdiction to prohibit, by injunction or otherwise, the State courts from using, as instruments of evidence,

those facts which the law of the State makes competent for the proof of the existence of the marriage relation, or of other rights and obligation relating to this domestic relation which we have seen in the first brief, pp. 7 to 13, to be so wholly reserved to the States as part of their police powers. And it seems to us equally palpable that the whole scope and gravamen of the bill by Sharon against his wife in the Circuit Court are directed to her prohibition from using the written marriage contract in the courts or elsewhere—is, in other words, one directed to a prohibition, through a decree of the Circuit Court, of proof in the State court of the existence of the marriage relation and of a right to a divorce.

It seems to us equally palpable, in the light of the authorities cited in our first brief (pp. 7–12) and in the light of the obvious principles defining and controlling the partition of powers between the Federal and the State governments, that, here quoting the words of this court, such division of said powers has denied "altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as incident to a divorce *a vinculo*, or to one from bed and board"—and that included in this denial is, palpably, embraced a denial to the Federal courts of jurisdiction for the purpose of abolishing instruments of evidence which have, in law, no legal significance whatever except as they bear upon the establishment of the marriage relation, or of divorce, or of right of alimony, and other matters springing exclusively out of such marriage relation.

And from the foregoing it inevitably results that it is no more a good reply to the foregoing authorities, (holding that the Federal courts cannot prohibit the State courts from considering, in a suit for divorce and alimony, the said written contract between Sharon and Hill) to say that such Federal courts *can* so prohibit be-

cause they have, owing to Sharon's residence in a different State from his alleged wife, concurrent jurisdiction over the matter embraced by said injunction decree, than it would be to make the said reply of concurrent jurisdiction were the suit of Sharon in the Circuit Court a suit for divorce, pure and simple.

And it is quite appropriate for us here, in the way of adding emphasis to the decision and utterance of this court which we have just quoted as found in Barber *v.* Barber, (21 Howard, 582,) where the majority of the court "disclaims altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony," to beg attention to the dissent delivered in that case by Justice Daniel in behalf of himself and Chief Justice Taney and Justice Campbell. There the three dissenting justices refused to go even so far as the majority went in holding that the courts of the United States have jurisdiction to *enforce a decree* giving alimony to a wife rendered by a State court having jurisdiction of both parties and granting the wife a divorce *a mensa et thoro.*

In concluding, we beg attention to this dissent because we desire to avail ourselves of the reasoning found in that dissent. Although this reasoning may not show that the majority of the court was in error in conceding jurisdiction to the Federal Court to enforce the decree of alimony rendered by a State court, yet surely such dissent does abundantly show that the error of the majority would have been most palpable and radical had the court conceded to the Federal Courts the jurisdiction to grant divorce and alimony, as is, we insist, virtually held by the Circuit Court in the decree covered by the revivor.

SAM'L SHELLABARGER
and J. M. WILSON,
for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1462.

DAVID S. TERRY AND SARAH ALTHEA TERRY, HIS WIFE, APPELLANTS,

vs.

FREDERICK W. SHARON, EXECUTOR OF WILLIAM SHARON, DECEASED, APPELLEE.

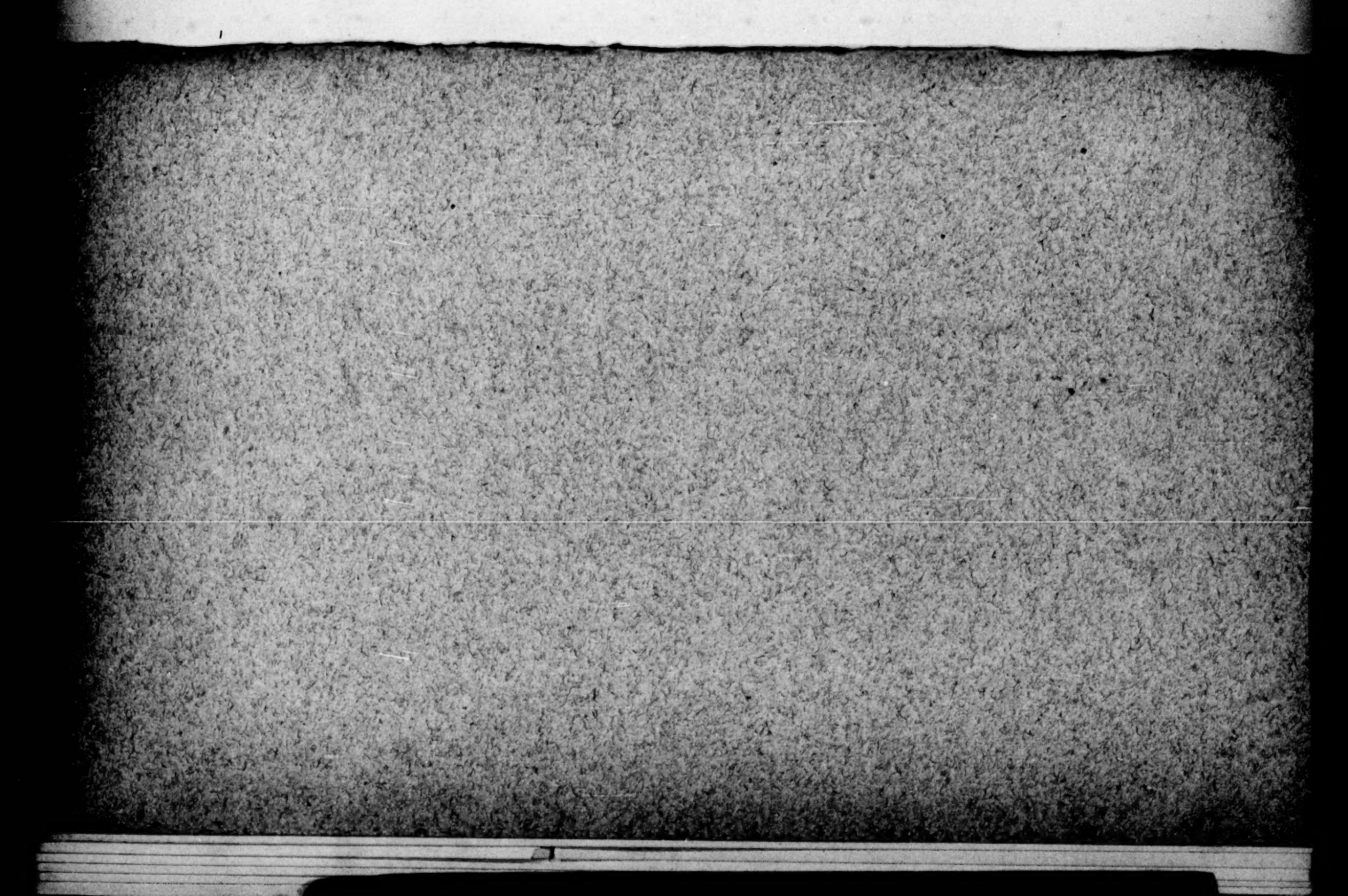
MOTION TO DISMISS OR TO AFFIRM.

BRIEF FOR APPELLEE ON MOTIONS TO DISMISS OR TO AFFIRM.

HENRY E. DAVIS,
For the Motions.

SAMUEL M. WILSON,
Of Counsel.

JUDD & DETWEILER, PRINTERS.



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MOTION TO DISMISS OR TO AFFIRM.

Comes now the appellee, by his counsel appearing in that behalf, and moves the Court to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the order or decree from which said appeal was taken is not a final decree.

And the said appellee, by counsel as aforesaid, also moves the Court to affirm the said order or decree from which said appeal was taken, because, although the record in the said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was taken for

delay only, and that the question on which such jurisdiction depends is so frivolous as not to need further argument.

HENRY E. DAVIS,
Counsel for the Appellee for the Purposes of these Motions.

NOTICE OF SUBMISSION OF MOTIONS.

To Messrs. Samuel Shellabarger and Jeremiah M. Wilson, Counsel for Appellants:

Please take notice that on Monday, the eighth day of April, A. D. 1889, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

HENRY E. DAVIS,
Counsel for the Appellee for the Purposes of the Motions.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 1462.

DAVID S. TERRY AND SARAH ALTHEA TERRY, HIS WIFE, APPELLANTS,

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FREDERICK W. SHARON, EXECUTOR OF WILLIAM SHARON, DECEASED, APPELLEE.

BRIEF FOR APPELLEE ON MOTIONS TO DISMISS OR TO AFFIRM.

STATEMENT OF THE CASE.

This appeal is from an order reviving a suit in equity after final decree, for the purpose of enforcing such decree.

The suit was originally brought by William Sharon, a citizen of the State of Nevada, against Sarah Althea Hill, a citizen of the State of California, to obtain a decree adjudging a certain paper in her possession purporting to be a declaration of marriage between them to be a forgery, and enjoining its use, and directing its cancellation. The bill was filed October 3, 1883 (Record, p. 5). The subpœna was served October 5, 1883 (p. 5). The defendant interposed a

demurrer to the bill, which was overruled (p. 7), then a plea in abatement (pp. 6–7), which, after replication, was adjudged false and overruled (p. 10); then her answer (p. 10) and supplemental answer (p. 15). The complainant filed his replications to these answers (pp. 14, 16), and after the taking of testimony and full hearing the court, on January 15, 1886, entered its final decree adjudging the so-called declaration of marriage to be a forgery, and ordering its surrender for cancellation (pp. 17–19), and granting a perpetual injunction against the respondent, in the following words, to wit:

"And it is further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent, and her and their agents and attorneys be, and they and each and all of them are hereby, perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same, in evidence or otherwise, to support any right claimed under it, or making any claim, or setting up any right, interest, or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest" (pp. 18–19).

The complainant, William Sharon, having died on November 13, 1885, and subsequent to the final submission of the cause on September 29, 1885, the court ordered the decree to be entered *nunc pro tunc* as of the date of submission—September 29, 1885 (pp. 17–19).

On March 12, 1888, Frederick W. Sharon, as executor of William Sharon, deceased, filed his bill of revivor in the cause, setting forth the fact of the death of William Sharon, his dying testate, the probate of his will, and the issuance of letters testamentary to said Frederick W. Sharon, as ex-

ecutor of said will; and, further, that the so-called declaration of marriage had not been surrendered for cancellation as ordered by said decree, and that the plaintiff feared that the defendant would claim and seek to enforce property rights as the wife of William Sharon, under and by virtue of said written declaration of marriage, under the decree of another court essentially founded thereupon, which decree, as he is advised, is wholly subordinate to the decree of the circuit court; contrary to the true intent, meaning, and spirit of the perpetual injunction ordered by said decree, and in violation of said injunction. It was further stated in this bill of revivor that on January 7, 1885, the defendant, Sarah Althea Hill, had intermarried with David S. Terry. He was accordingly made a defendant with her to the bill.

The prayer of the bill was that the defendants be required to show cause why the original suit and the proceedings therein should not stand revived against them and be in the same plight and condition as the same were at the time of the abatement thereof, and further to stand to and abide such order and decree in the premises as was meet (pp. 21–'3.)

To this bill of revivor the defendant interposed a demurrer (p. 25), which was afterwards amended so as to state, as grounds of demurrer, that the court had no jurisdiction of the subject-matter of the suit and no jurisdiction to grant the relief prayed for in the bill or any part thereof; that the plaintiff had not shown any right or title to maintain the suit; that the bill was ambiguous and uncertain, in that it failed to show what particular property was involved therein, and that the bill did not contain any matter of equity whereon the court could ground any decree or give to the plaintiff any relief against the defendants or either of them (p. 26).

After argument of counsel, the court entered an order overruling the demurrer and reviving the suit in the name of the executor of William Sharon, as complainant, and

against Sarah Althea Terry and David S. Terry, her husband, as respondents, and directing that the executor have the full benefit, rights, and protection of the decree, and full power to enforce the same against the defendants and each of them at all times and in all places, and in all particulars (pp. 27–'8).

From this order of revivor the respondents prayed an appeal, which the court allowed "without any stay of proceedings on the decree or order appealed from, and the amount of the bond, which shall be for costs only, is ordered to be fixed at five hundred dollars" (p. 86).

The appellee now moves to dismiss this appeal or to affirm the order or decree of revivor.

I.

ARGUMENT ON THE MOTION TO DISMISS.

The order of revivor is clearly not appealable unless it can be held to be a *final decree*, for by the terms of the law of Congress appeals in equity cases are limited to *final decrees*.

Sec. 692, Revised Statutes.

The decree of January 15, 1886, determined the litigation between the parties and left nothing for judicial action except the mere enforcement of such decree. The action of the court below in passing this decree was subject to the right of appeal, but its action looking to enforcement of the decree is non-appealable, because such action follows the decree as a matter of course, if it is not reversed or modified upon direct appeal.

The only purpose of the order of revivor was to place the plaintiff—the executor of the original deceased plaintiff—in position to invoke the powers of the Court, if necessary, in

the execution and enforcement of the decree. The defendants could not be required to surrender the forged writing for cancellation, as ordered by the decree, nor be punished for a violation of the injunction granted until after the revival of the suit.

Hawley *vs.* Bennett, 4 Paige, 163–'4.
Justice *vs.* McBroom, 1 Lea. (Tenn.), 556.

The order of revivor, therefore, being but a preliminary step towards the enforcement of a final decree, the question is whether such order is subject to the right of appeal.

This Court has held that a supplemental decree ordering a sale of property pursuant to an original decree is not a final decree, in the contemplation of the acts of Congress, from which an appeal lies, such supplemental decree being but a decree in execution of the original decree.

Carr *vs.* Hoxie, 13 Peters, 462.

So it has been held that an order of attachment to compel a defendant to execute a conveyance as directed by a previous decree is in no sense a final decree from which an appeal could be sustained, it being but the ordinary means of enforcing the original decree.

McMicken *vs.* Perin, 20 How., 133.

And it is held that the application of a purchaser at a judicial sale for process to obtain possession of the land sold is not a suit in which any final decree can be passed so as to give either party a right to appeal. The order of the court directing process to issue in such case is not such a final order or decree as the act authorizing appeals contemplates. It is nothing more than an order of process to carry into execution a final decree already passed.

Callan *vs.* May, 2 Black, 542.

In Smith *vs.* Trabue's Heirs (9 Peters, 4) it is held that a judgment awarding a writ of restitution to one who had been improperly turned out of possession in ejectment is not a final judgment, and is not therefore appealable. The Court says: "It is no more than the action of a court on its own process, which is submitted to its own discretion. This Court takes no jurisdiction in such a case. It is not, we think, given by the judicial act." (9 Peters, 7.)

So, in Gregg *vs.* Forsyth (2 Wall., 56), it is held that an order refusing to award a writ of restitution in ejectment is not a final judgment from which a writ of error will lie.

And in Barton *vs.* Forsyth (5 Wall., 190) it is held that a judgment setting aside a writ of restitution which had been issued in favor of the defendant and granting a similar writ to the plaintiff is not a final judgment within the provision of the judiciary act limiting the appellate jurisdiction of this Court on writs of error to final judgments.

The order of a circuit court upon a writ of error *coram vobis*, which is in the nature of a motion to amend a judgment, is not reviewable upon writ of error, because not a final judgment.

Pickett's Heirs *vs.* Legerwood, 7 Peters, 144.

No appeal lies from an order refusing to open a former decree.

Brockett *vs.* Brockett, 2 How., 238.
McMicken *vs.* Perin, 18 How., 507, 511.

The refusal to quash an execution furnishes no ground for writ of error, not being a final judgment.

Boyle *vs.* Zacharie, 6 Peters, 648.
Toland *vs.* Sprague, 12 Peters, 331.
Evans *vs.* Gee, 14 Peters, 1.

So an order quashing an execution is not appealable.

McCargo *vs.* Chapman, 20 How., 556–'7.

Mr. Justice Matthews, in the case of The Elmira (16 Fed. Rep., 133), holds, after an elaborate review of the authorities, that where a final decree is rendered against the claimant of a vessel, and against his sureties on a stipulation, and executions are issued and levied on the real estate of one of the stipulators, who claims to have been incapable, by reason of her coverture, of executing a valid stipulation, an order of the district court denying her motion praying that the executions under which the marshal was proceeding to sell her property be quashed, set aside, and satisfied, and all proceedings therein be stayed, is not a final order or decree, and therefore no appeal will lie therefrom to the circuit court, the appellate jurisdiction in such case being limited to final decrees.

And in the case of the *Brig Hollen* (1 Mason, 431) it is held by Mr. Justice Story that an order of the circuit court refusing to supersede the execution and to stay proceedings upon a final decree (not appealed from) in an admiralty cause was not a final decree and therefore not appealable. He says:

"It (the district court) has the sole power over its own process to execute its own decrees, and it would be a strange anomaly in our law if one court had rightfully the sole possession of the cause and another court, having no authority to inquire into the merits of the cause, could arrest the process by which it was to be enforced; nor is there any more inconvenience in this case than in every other where a court having final jurisdiction awards process to enforce its own judgment. It may always happen that a possible injustice may arise; but the true remedy is an application to the court which has control over the process." (1 Mason, 436.)

In Davis *vs.* Braden (10 Peters, 288) a motion upon *scire facias* to revive an action of detinue having been denied, a second motion, at a subsequent day in the same term, was made to rescind the order refusing to revive the suit. The judges being opposed in opinion whether the action could be revived, the case was taken to the supreme court on a

certificate of a division of opinion. That court held that it could not take cognizance of the question certified, *the case being one resting entirely in the discretion of the circuit court*, and did not, therefore, present a point which could be certified under the act of Congress.

Repeated adjudications of the State courts indicate clearly that an order of revivor of this character, which pertains only to the procedure in the suit and is not determinative of any substantial right, cannot be held appealable.

In California it is held that an order substituting a party plaintiff is not a final judgment, nor is it an appealable order.

Welsh *vs.* Allen, 54 Cal., 211.

In New York, under a statute allowing an appeal from any order involving the merits of the action, it was held that an order refusing to substitute in the place of a deceased plaintiff his representative or successor in interest to prosecute the suit did not involve the merits and was not appealable; that where it is a matter of doubt who was the plaintiff's successor and different parties are proposed to be substituted to save the rights it is a matter of discretion with the court to allow or not their substitution, and that no appeal lay from an order of the court refusing the proposed substitution.

St. John *vs.* West, 4 How. Pr., 329.

So the New York court of appeals dismissed an appeal from an order of the supreme court reversing an order vacating an order reviving an action against the representatives of a deceased defendant. The order appealed from was in effect an order reviving the action, and it was held that it did not affect any substantial right, and was therefore not appealable.

Arthur *vs.* Griswold, 60 N. Y., 145.

In re Whittlesey *vs.* Hoguet (66 N. Y., 358) it is held that an order reviving against his executors a proceeding instituted against a discharged trustee and pending at his death is not a final order affecting a substantial right within the meaning of the New York code, and is not appealable. It is merely an order "to remove an obstruction occasioned by the death of one of the parties to further proceedings in the application to vacate the order discharging the trustee and his sureties, and which, until removed, prevented a final order being made upon the application. It was an intermediate order relating to the procedure. It left the question whether the order should be vacated undetermined." The court accordingly dismissed the appeal from the order of revivor, declining to pass upon the question of the power of the court to make the order appealed from. (66 N. Y., 359–'60.)

The cases which hold that a writ of error will lie to an improper revivor of a judgment at law upon a writ of *scire facias* are not in conflict with our position, for the judgment upon the writ of *scire facias* is a final award of execution upon a money judgment the right to execute which has become lost; and, as defenses of payment or satisfaction may arise, so as to occasion a trial, the proceeding in such cases takes the form of an action in which final judgment is rendered awarding execution or denying it, as the case may be. The proceeding is in effect a new action upon the old judgment, ending in another judgment of equal dignity with the old, and cannot be likened to a mere order of revivor in equity, the effect of which is simply and only to substitute in lieu of a deceased party his representative in law, so that he may prosecute or defend his rights in the suit in the same manner as the decedent might do if he were still alive. By the judgment at law upon the *scire facias* the proceedings before the court are ended, but after the order of revivor in equity the court must, if no decree has passed, proceed to a

decree, or, if a decree has been entered, must hear and determine the proceedings necessary to carry the decree into execution.

It is manifest that the order of revivor in the case at bar has to do only with the question of the enforcement of the final decree of January 15, 1886. It is the mere substitution of a party who is, as a matter of course, entitled to enforce the decree as the representative in law of the deceased plaintiff. Furthermore, the order of revivor is merely preliminary to the enforcement of the final decree, which may require further judicial action by way of attachment to compel its execution; but even such an order of attachment would not be appealable, as is explicitly held in McMicken *vs.* Perin (20 How., 133). The order of revivor certainly can have no greater effect than an order for the execution of a final decree, from which no appeal will lie under the authority of Carr *vs.* Hoxie (13 Peters, 460). According to these authorities, if the original plaintiff, Sharon, were alive and had been granted an order of attachment to compel the enforcement of the decree such order would not be a final decree, nor appealable; and it must follow that if the order made upon application of Sharon to execute this decree would not be appealable no appeal will lie from the order of revivor, an interlocutory order allowing the executor of Sharon to proceed as Sharon might have proceeded if he were living, for that is the only effect of the order of revivor.

The fact that the defendants opposed the order of revivor upon the ground that the court was without jurisdiction to render the original decree of January 15, 1886, cannot affect or change in any manner the nature of the order of revivor.

If it be true that the original decree in this case is void for want of jurisdiction apparent upon the face of the record, the only remedy against the enforcement thereof would be

by *habeas corpus* to relieve the defendants from an unauthorized imprisonment for refusal to obey a void decree; but if the decree is to be held good as against collateral attack the defendants cannot legally resist its enforcement.

In the case at bar no proceedings to enforce the decree could be taken until after the order of revivor. No such proceedings appear to have yet been taken, and no matter of right which may arise in these proceedings has been finally determined. It does not yet appear that any order will be made in enforcing the decree which will affect any substantial right of the defendants. They have no right to complain of the execution of this decree. They can only complain when something is done by the court in executing this decree which is not authorized by it, in which case the court would exceed its jurisdiction, and the remedy would be by *habeas corpus*.

The order of revivor, therefore, has no element of a final decree. It does not finally determine any substantial right, and it does not even end the proceedings to enforce the decree; on the contrary, it is based upon the patent fact that proceedings necessary to the enforcement of the decree are to be had, and that the attendance of the defendants is still required for the purpose of performing the command of the court.

In considering a bill of revivor the court cannot go back of the decree and look into the merits.

A bill of revivor puts in issue nothing but the character of the new party brought in.

Fretz *vs.* Stover, 22 Wall., 198.
Bettes *vs.* Dana, 2 Sumn., 383.
Devaynes *vs.* Morris, 1 Myl. & Cr., 213, 225.
Story's Eq. Pl., secs. 377, 379.
Vredenburgh *vs.* Snyder, 6 Iowa, 39.
Miller *vs.* Shackleford, 16 Ala., 95.
Duncan *vs.* Hargraves, 22 Ala., 166.

On a bill of revivor the sole question is whether the party seeking to revive is entitled to put the cause in a proper state to carry on the decree, and this without any reference to the merits of the decree. If the proper time for making defense on the merits has been permitted to pass, the omission cannot be supplied in a contest on the bill of revivor. The right of a party to prosecute the decree, and therefore to do what is necessary for that purpose, cannot depend upon the merits of the decree.

Devaynes *vs.* Morris, *ubi supra.*

And this principle extends even to the question of the jurisdiction of the court to render the decree. The rule is the same in the analogous action of *scire facias* on a judgment.

Duncan *vs.* Hargraves, *ubi supra.*

It is confidently submitted that no case can be produced in which assault on the decree has been permitted on a bill to revive. There are cases in which the jurisdiction has been inquired into at a stage subsequent to the decree; but all such are cases in which actual enforcement of the decree had been attempted; none are cases in which the question was allowed to intervene between the decree and an attempt to enforce it. The proper mode of attacking a decree is by appeal or bill of review, and in case of an attempt to enforce the decree in certain cases the jurisdiction may be questioned; but to permit this question to be raised on a bill to revive would, if the jurisdiction were denied, result in the anomaly of an unreversed decree being suspended in the air—that is to say, the decree would be left in apparent full force and effect without any judgment in due course against its validity, but yet the decree itself could not be availed of.

Nor is the question affected by the insertion of supposed supplemental matter in the bill to revive.

The supposed supplemental matter is not really such. It consists of the allegation of the intermarriage of the appellants since the decree on the original bill and the inclusion of the husband in the prayer for revivor. (R., p. 23.)

The insertion of this allegation was necessary only to identify the wife as the defendant to the original bill. In all other respects, as appears below, it was unnecessary.

And if the appellants had wished to take advantage of the insertion of this matter as improper, they could have done so in only one way, namely, by demurring to that matter alone. It cannot be taken advantage of on general demurrer.

Randolph *vs.* Dickerson, 5 Paige, 517.

But the matter itself is immaterial, is not matter of substance, and may be regarded as surplusage. The appellant, David S. Terry, has no interest in the premises. He acquired no interest in his wife's property by virtue of his marriage.

Civil Code Cal., secs. 157, 162, 173.
Craener *vs.* Craener, 52 Cal., 302.
See Lewis *vs.* Johns, 24 Cal., 98.

And no relief is prayed against him. The sole prayer of the bill of revivor is for revivor. (R., 23.)

II.

ARGUMENT ON THE MOTION TO AFFIRM.

But if the Court should be of opinion that the appeal should not be dismissed, it is submitted that the order of revivor should be affirmed.

The only ground upon which the jurisdiction of this Court in the premises can be asserted is that the court below had not jurisdiction to pass the decree on the original

bill; the proposition that that court had not authority to make the order of revivor is subordinate to and depends upon this.

The jurisdiction is assailed on several grounds, of which it is necessary to consider only two.

1. It is said that the original bill presents a subject-matter having its foundations in, or affecting, conjugal relations created and existing under the laws of the State of California; and that such subject-matter is not within the jurisdiction of the circuit courts of the United States as defined by section 629, R. S.

Very earnest and elaborate argument has been expended upon this proposition at the different stages of this cause. With the greatest deference to the learned counsel who have advanced and enforced the proposition, it seems to need but brief attention.

The original bill in no sense concerns the relation of marriage, whether we consider the formation, continuance, duties, or dissolution of that relation. The sole object of the bill was to adjudge a certain written instrument void and to decree its cancellation. The *status* of marriage, by the hypothesis of the bill, never existed between the parties to the controversy, and the purpose of the bill was to procure an adjudication, not that the *status* did or did not exist by virtue of that instrument, but that that instrument itself never existed. It is the primary object, and not the secondary result, of a given litigation which fixes its character as affecting the jurisdiction of the court.

Now, the object of the original bill was not to procure a determination of the question whether a given fact or set of facts accomplished the creation of the relation of marriage or in anywise affected such relation at any time existing. In no sense whatever did it concede the relation ever to have existed or any act ever to have been done which could have created it. The object of the bill was to procure an adjudi-

cation that a certain alleged written instrument, whatever its effect, was "false, forged, counterfeit, and fraudulent," and null and void against the complainant, "and ought in equity and good conscience to be so declared and ordered to be delivered up to be annulled and cancelled." (R., p. 3, fol. 5.)

While, therefore, it has been ingeniously argued that the litigation concerns the relation of marriage, the argument, as is seen, will not bear the test of examination. The affecting such relation is wholly a secondary feature of the case. That whether a given, conceded fact or set of facts established a marriage, and whether a marriage should be declared fraudulent and void because of something attending such given fact or set of facts, are questions wholly within the jurisdiction of the State courts is not doubted; but what is confidently asserted is that the jurisdiction of the United States courts (supposing such to exist) to decree a given instrument false and void is not taken away because of the secondary fact that such instrument, if not false and void, would constitute or affect the relation of marriage. In other words, the right of a court to declare an instrument forged cannot be affected by the contention on the part of the forger that if the instrument be genuine it gives him a right as to litigation over which another court has exclusive jurisdiction.

The distinction here pointed out was clearly in the mind of the court below, as appears from the opinion, wherein it is said (R. 66): "A court of equity having jurisdiction to lay its hands upon and control forged and fraudulent instruments, it matters not with what pretensions and claims their validity may be asserted by their possessor, *whether they establish a marriage relation with another*, or render him an heir to an estate, or confer a title to designated pieces of property, or create a pecuniary obligation." And of the soundness of the distinction we see no room for doubt.

2. It is said, however, that the circuit court has not jurisdiction to declare the written instrument in question a forgery, because so to do would merely be to abolish and put out of the way a mere item or instrument of evidence not being an instrument affecting property rights, thus in effect dealing with a subject-matter and attempting to exercise a jurisdiction not known to the chancery law.

That a court of equity may, as aptly expressed in the citation from the opinion above made, "lay its hands upon and control forged and fraudulent papers" cannot be doubted; but the distinction sought to be made is that a court of equity may so do only when the instrument affects property rights.

For refutation of this position we may well be content to rely upon the opinion below and its accompanying citations as set out in the Record (pp. 65–'8); as also for the demonstration that the instrument in question really does affect property rights (pp. 62–'5).

But to what is there said may be added two suggestions:

a. The contention that the original bill seeks only to put out of the way a piece of evidence really yields the question. For in all conceivable cases in which a court of equity may interfere to cancel an instrument the ground of interference is that the instrument may be used *as evidence* to harass or injure the complainant. A deed to land is only evidence of a grant; so also a bond or promissory note is only evidence of an obligation or debt. In each of these cases the thing established by the instrument is the substantial matter sought; the instrument is only evidence of that substantial matter—*i. e.*, of the grant, obligation, or debt. The argument for the appellants on this point would simply destroy the jurisdiction of equity to declare instruments false or void..

b. The statute law of California gives the very remedy

sought by the complainant. By section 3412 of the civil code it is provided as follows:

"A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged and ordered to be delivered up or canceled."

Beyond all question the original bill sufficiently alleges apprehended serious injury to the complainant; and whilst alterations in the jurisdiction of the State courts cannot affect the equitable jurisdiction of the circuit courts of the United States, so long as the equitable rights themselves remain, yet an enlargement of equitable rights by the State may be administered by the circuit courts as well as by the courts of the State.

Clark *vs.* Smith, 13 Pet., 195.
Broderick's Will, 21 Wall., 503.
Holland *vs.* Challen, 110 U. S., 15.

As to the objection to the jurisdiction touching the amount in controversy it will suffice to refer to the treatment of the question in the opinion. (Record, pp. 62–66.)

And, finally, it is important to observe that the question of jurisdiction was fully considered at the hearing on the original bill and was then determined. The decision of the court at that hearing was open to appeal or review in the usual way, but is not open to review on a bill of revivor. But, as is stated in the opinion (pp. 61–'2), the question, with others applicable to the original bill, was argued below as though that bill instead of the bill of revivor were on hearing, and the authorities cited by counsel for the appellees were accordingly found to be such as might be applicable to a hearing on appeal or bill of review only. It is believed that none of them are applicable to a hearing on a bill to revive.

And as to the contention that no cases are to be found in which courts of equity have set aside written marriage contracts on the ground of forgery, it will suffice to say that such contracts are of very modern origin and exist in but few jurisdictions; if, indeed, they exist under any system but that of California. (See Civil Code Cal., sec. 75.)

In view of these considerations it is confidently submitted that the appeal should be dismissed, or that, in the event that the appeal is not dismissed, the order of revivor should be affirmed.

HENRY E. DAVIS,
For the Motions.

SAMUEL M. WILSON,
Of Counsel.

Office Supreme Court U. S.
FILED.
FEB 19 1889
JAMES H. McKENNEY.
CLERK.

No. 1,462.

In the Supreme Court of the United States

DAVID S. TERRY and
SARAH A. TERRY, his wife,
Appellants,

vs.

FREDERICK W. SHARON,
Executor of WILLIAM SHARON, Deceased,
Appellee.

Motion to Dismiss Appeal, and Brief of Appellee in support of Motion.

SAMUEL M. WILSON,
Counsel for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

DAVID S. TERRY, and
SARAH A. TERRY, his Wife,
Appellants,
vs.
FREDERICK W. SHARON,
Executor of WILLIAM SHARON, Deceased,
Appellee.

No. 1462.

MOTION TO DISMISS APPEAL.

Comes now the appellee and moves the Court to dismiss the appeal in this case for want of jurisdiction, because the order or decree from which the appeal was taken is not a final decree.

SAMUEL M. WILSON,
Counsel for Appellee for the purposes of this motion.

NOTICE OF SUBMISSION.

To Messrs Stanly, Stoney & Hayes, and Wm. T. Baggett, Esq., Solicitors and of Counsel for Appellants:

Please take notice, that on the fourth day of March, A. D, 1889, or as soon thereafter as the Court

can hear the application, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States, for the decision of the Court therein. Annexed hereto is a copy of my brief, or argument, in support of said motion.

SAMUEL M. WILSON,

Counsel for Appellee for the purposes of this motion.

In the Supreme Court of the United States.

DAVID S. TERRY and
SARAH ALTHEA TERRY,
his Wife,
Appellants,
vs.
FREDERICK W. SHARON,
Executor of WILLIAM SHARON,
Deceased,
Appellee.

BRIEF OF APPELLEE ON MOTION TO DISMISS APPEAL.

Statement of the Case.

This appeal is from an order reviving a suit in equity after final decree for the purpose of enforcing such decree.

The suit was originally brought by William Sharon, a citizen of the State of Nevada, against Sarah Althea Hill, a citizen of the State of California, to obtain a decree adjudging a certain paper in her possession purporting to be a declaration of marriage between them to be a forgery, and enjoining its use, and directing its cancellation. The bill was filed October 3, 1883 (Record, p. 7).* The subpoena was served Octo-

* The references to the Transcript are to the paging of the original.

ber 5, 1883 (p. 8). The defendant interposed a demurrer to the bill, which was overruled (p. 9), then a plea in abatement (p. 10), which, after replication, was adjudged false and overruled (p. 14); then her answer (p. 15) and supplemental answer (p. 22). The complainant filed his replications to these answers (pp. 21, 23), and after the taking of testimony and full hearing, the Court on January 15, 1886, entered its final decree adjudging the so-called declaration of marriage to be a forgery, and ordering its surrender for cancellation (pp. 25–26), and granting a perpetual injunction against the respondent, in the following words, to wit:

"And it is further ordered, adjudged and decreed, that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent and her and their agents and attorneys, be, and they and each and all of them are hereby perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same in evidence or otherwise to support any right claimed under it, or making any claim, or setting up any right, interest or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property, or right of any kind or nature against said complainant, his heirs, executors, administrators or successors in interest" (p. 27.)

The complainant, William Sharon, having died on November 13, 1885, and subsequent to the final submission of the cause on September 29, 1885, the Court ordered the decree to be entered *nunc pro tunc* as of the date of submission—September 29, 1885. (pp. 25–7.)

On March 12, 1888, Frederick W. Sharon, as execu-

tor of William Sharon, deceased, filed his Bill of Revivor in the cause, setting forth the fact of the death of William Sharon, his dying testate, the probate of his will and the issuance of letters testamentary to said Frederick W. Sharon, as executor of said will, and further, that the so-called declaration of marriage had not been surrendered for cancellation as ordered by said decree, and that the plaintiff feared that the defendant would claim and seek to enforce property rights as the wife of William Sharon under and by virtue of said written declaration of marriage, under the decree of another Court essentially founded thereupon, which decree, as he is advised, is wholly subordinate to the decree of the Circuit Court, contrary to the true intent, meaning and spirit of the perpetual injunction ordered by said decree and in violation of said injunction. It was further stated in this bill of revivor, that on January 7, 1885, the defendant, Sarah Althea Hill, had intermarried with David S. Terry. He was accordingly made a defendant with her to the bill.

The prayer of the bill was that the defendants be required to show cause why the original suit and the proceedings therein should not stand revived against them and be in the same plight and condition as the same were at the time of the abatement thereof; and further to stand and abide such order and decree in the premises as was meet (pp. 31–35).

To this bill of revivor the defendant interposed a demurrer (p. 38), which was afterwards amended so as to state as grounds of demurrer, that the Court had no jurisdiction of the subject-matter of the suit and no jurisdiction to grant the relief prayed for in the bill, or any part thereof; that the plaintiff had not shown any right or title to maintain the suit; that the

bill was ambiguous and uncertain in that it failed to show what particular property was involved therein and that the bill did not contain any matter of equity wherein the Court could ground any decree, or give to the plaintiff any relief against the defendants, or either of them (p. 41).

After argument of counsel, the Court entered an order overruling the demurrer and reviving the suit in the name of the executor of William Sharon as complainant, and against Sarah Althea Terry and David S. Terry, her husband, as respondents, and directing that the executor have the full benefit, rights and protection of the decree, and full power to enforce the same against the defendants and each of them at all times, and in all places, and in all particulars (pp. 45–6).

From this order of revivor the respondents prayed an appeal, which the Court allowed "without any stay of proceedings on the decree or order appealed from, and the amount of the bond, which shall be for costs only, is ordered to be fixed at five hundred dollars" (p. 143).

The appellee now moves to dismiss this appeal, upon the ground that the order of revivor is not *a final decree.*

Argument.

The order of revivor is clearly not appealable, unless it can be held to be a *final decree,* for by the terms of the law of Congress, appeals in equity cases are limited to *final decrees.*

Sec. 692 Revised Statutes.

The decree of January 15, 1886, determined the litigation between the parties, and left nothing for judicial

action, except the mere enforcement of such decree. The action of the Court below in passing this decree was subject to the right of appeal, but its action in enforcing the decree is non-appealable, because such enforcement follows the decree as a matter of course, if it is not reversed or modified upon direct appeal.

The only purpose of the order of revivor was to place the plaintiff—the executor of the original deceased plaintiff—in position to invoke the powers of the Court, if necessary in the execution and enforcement of the decree. The defendants could not be required to surrender the forged writing for cancellation, as ordered by the decree, nor punished for a violation of the injunction granted, until after the revival of the suit.

Hawley vs. *Bennett*, 4 Paige, 163–4.

Justice vs. *McBroom*, 1 Lea. (Tenn.), 556.

The order of revivor, therefore, being but a preliminary step towards the enforcement of a final decree, the question is whether such order is subject to the right of appeal.

This court has held that a supplemental decree ordering a sale of property pursuant to an original decree, is not a final decree in the contemplation of the acts of Congress, from which an appeal lies, such supplemental decree being but a decree in execution of the original decree.

Carr vs. *Hoxie*, 13 Peters, 462.

So it has been held that an order of attachment to compel a defendant to execute a conveyance as directed by a previous decree, is in no sense a final decree from which an appeal could be sustained, it being but the ordinary means of enforcing the original decree.

McMicken vs. *Perin*, 20 How., 133.

And it is held that the application of a purchaser at a judicial sale for process to obtain possession of the land sold, is not a suit in which any final decree can be passed so as to give either party a right to appeal. The order of the Court directing process to issue in such case, is not such a final order or decree as the act authorizing appeals contemplates. It is nothing more than an order of process to carry into execution a final decree already passed.

Callan vs. *May*, 2 Black., 542.

In *Smith* vs. *Trabue's Heirs* (9 Peters, 4), it is held that a judgment awarding a writ of restitution to one who had been improperly turned out of possession in ejectment, is not a final judgment, and is not therefore appealable. The Court says: "It is no more than the action of a Court on its own process, which is submitted to its own discretion. This Court takes no jurisdiction in such a case. It is not, we think, given by the judicial act." (9 Peters, 7.)

So in *Gregg* vs. *Forsyth* (2 Wall., 56), it is held that an order refusing to award a writ of restitution in ejectment is not a final judgment from which a writ of error will lie.

And in *Barton* vs. *Forsyth* (5 Wall., 190), it is held that a judgment setting aside a writ of restitution which had been issued in favor of the defendant, and granting a similar writ to the plaintiff, is not a final judgment within the provision of the Judiciary Act limiting the appellate jurisdiction of this Court on writs of error to final judgments.

The order of a Circuit Court upon a writ of error *coram vobis*, which is in the nature of a motion to amend

a judgment, is not reviewable upon writ of error, because not a final judgment.

Pickett's Heirs vs. *Legerwood*, 7 Peters, 144.

No appeal lies from an order refusing to open a former decree.

Brockett vs. *Brockett*, 2 How., 238.

McMicken vs. *Perin*, 18 How., 507, 511.

The refusal to quash an execution furnishes no ground for writ of error, not being a final judgment.

Boyle vs. *Zacharie*, 6 Peters, 648.

Toland vs. *Sprague*, 12 Peters, 331.

Evans vs. *Gee*, 14 Peters, 1.

So an order quashing an execution is not appealable.

McCargo vs. *Chapman*, 20 How., 556–7.

Mr. Justice Matthews, in the case of *The Elmira* (16 Fed. Rep., 133), holds, after an elaborate review of the authorities, that where a final decree is rendered against the claimant of a vessel, and against his sureties on a stipulation, and executions are issued and levied on the real estate of one of the stipulators, who claims to have been incapable, by reason of her coverture, of executing a valid stipulation, an order of the District Court denying her motion praying that the executions under which the marshal was proceeding to sell her property be quashed, set aside and satisfied, and all proceedings therein be stayed, is not a final order or decree, and therefore no appeal will lie therefrom to the Circuit Court; the appellate jurisdiction in such case being limited to final decrees.

And in the case of the *Brig Hollen* (1 Mason, 431), it is held, by Mr. Justice Story, that an order of the Circuit Court refusing to supersede the execution and to stay proceedings upon a final decree (not appealed from) in an admiralty cause was not a final decree and therefore not appealable. He says:

"It (the District Court) has the sole power over its own process to execute its own decrees; and it would be a strange anomaly in our law, if one court had rightfully the sole possession of the cause, and another court, having no authority to inquire into the merits of the cause, could arrest the process by which it was to be enforced. Nor is there any more inconvenience in this case than in every other, where a court, having final jurisdiction, awards process to enforce its own judgment. It may always happen that a possible injustice may arise; but the true remedy is in an application to the court which has control over the process." (1 Mason, 436.)

In *Davis* vs. *Braden* (10 Peters, 288), a motion upon *scire facias* to revive an action of detinue having been denied, a second motion, at a subsequent day in the same term, was made to rescind the order refusing to revive the suit. The judges being opposed in opinion whether the action could be revived, the case was taken to the Supreme Court on a certificate of a division of opinion. That court held that it could not take cognizance of the question certified, *the case being one resting entirely in the discretion of the Circuit Court*, and did not therefore present a point which could be certified under the Act of Congress.

We have authorities in the state courts which indicate clearly that an order of revivor of this character, which pertains only to the procedure in the suit, and

is not determinative of any substantial right, cannot be held appealable.

In California, it is held that an order substituting a party plaintiff, is not a final judgment, nor is it an appealable order.

Welsh vs. *Allen*, 54 Cal., 211.

In New York, under a statute allowing an appeal from any order involving the merits of the action, it was held that an order refusing to substitute in the place of a deceased plaintiff, his representative or successor in interest to prosecute the suit, did not involve the merits and was not appealable; that where it is a matter of doubt who was the plaintiff's successor, and different parties are proposed to be substituted to save the rights, it is a matter of discretion with the court to allow or not their substitution, and that no appeal lay from order of the court refusing the proposed substitution.

St. John vs. *West*, 4 How. Pr., 329.

So the New York Court of Appeals dismissed an appeal from an order of the Supreme Court reversing an order vacating an order reviving an action against the representatives of a deceased defendant. The order appealed from was in effect an order reviving the action, and it was held that it did not affect any substantial right and was therefore not appealable.

Arthur vs. *Griswold*, 60 N. Y., 145.

In re Whitlesey vs. *Hoguet* (66 N. Y., 358), it is held that an order reviving against his executors a proceeding instituted against a discharged trustee, and pending at his death, is not a final order affecting a sub-

stantial right within the meaning of the New York Code, and is not appealable. It is merely an order "to remove an obstruction, occasioned by the death of one of the parties, to further proceedings in the application to vacate the order discharging the trustee and his sureties, and which, until removed, prevented a final order being made upon the application. It was an intermediate order relating to the procedure. It left the question whether the order should be vacated undetermined." The court accordingly dismissed the appeal from the order of revivor, declining to pass upon the question of the power of the court to make the order appealed from (66 N. Y., 359–60).

The cases which hold that a writ of error will lie to an improper revivor of a judgment at law upon a writ of *scire facias*, are not in conflict with our position, for the judgment upon the writ of *scire facias* is a final award of execution upon a money judgment, the right to execute which has become lost; and as defenses of payment or satisfaction may arise, so as to occasion a trial, the proceeding, in such cases, takes the form of an action in which final judgment is rendered awarding execution or denying it, as the case may be. The proceeding is in effect a new action upon the old judgment, ending in another judgment of equal dignity with the old, and cannot be likened to a mere order of revivor in equity, the effect of which is simply and only to substitute in lieu of a deceased party his representative in law, so that he may prosecute or defend his rights in the suit in the same manner as the decedent might do if he were still alive. By the judgment at law upon the *scire facias*, the proceedings before the court are ended, but, after the

order of revivor in equity, the court must, if no decree has passed, proceed to a decree, or if a decree has been entered, must hear and determine the proceedings necessary to carry the decree into execution.

It is manifest that the order of revivor in the case at bar has to do only with the question of the enforcement of the final decree of January 15, 1886. It is the mere substitution of a party who is, as a matter of course, entitled to enforce the decree as the representative in law of the deceased plaintiff. Furthermore, the order of revivor is merely preliminary to the enforcement of the final decree, which may require further judicial action by way of attachment to compel its execution. But even such an order of attachment would not be appealable as is explicitly held in *McMicken* vs. *Perin* (20 How., 133). The order of revivor certainly can have no greater effect than an order for the execution of a final decree, from which no appeal will lie under the authority of *Carr* vs. *Hoxie* (13 Peters, 460). According to these authorities, if the original plaintiff, Sharon, were alive, and had been granted an order of attachment to compel the enforcement of the decree, such order would not be a final decree, nor appealable; and it must follow that if the order made upon application of Sharon to execute this decree would not be appealable, no appeal will lie from the order of revivor—an interlocutory order allowing the executor of Sharon to proceed as Sharon might have proceeded if he were living, for that is the only effect of the order of revivor.

The fact that the defendants opposed the order of revivor upon the ground that the court was without

jurisdiction to render the original decree of January 15, 1886, cannot affect or change in any manner the nature of the order of revivor.

If it be true that the original decree in this case is void for want of jurisdiction apparent upon the face of the record, the only remedy against the enforcement thereof would be by *habeas corpus*, to relieve the defendant from an unauthorized imprisonment for refusal to obey a void decree; but if the decree is to be held good as against collateral attack, the defendants cannot legally resist its enforcement.

In the case at bar, no proceedings to enforce the decree could be taken until after the order of revivor. No such proceedings appear to have yet been taken and no matter of right which may arise in these proceedings has been finally determined. It does not yet appear that any order will be made in enforcing the decree which will affect any substantial right of the defendants. They have no right to complain of the execution of this decree. They can only complain when something is done by the Court in executing this decree which is not authorized by it; in which case the Court would exceed its jurisdiction, and the remedy would be by *habeas corpus*.

The order of revivor therefore has no element of a final decree. It does not finally determine any substantial right, and it does not even end the proceedings to enforce the decree; on the contrary, it is based upon the patent fact that proceedings necessary to the enforcement of the decree are to be had, and that the attendance of the defendant is still required for the purpose of performing the command of the court.

On principle and authority we conclude that the order of revivor appealed from is not a final decree, and that the appeal should therefore be dismissed.

Respectfully submitted,

SAMUEL M. WILSON,
Counsel for Appellee.